TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1078~~. 728 ~~413~~

STUTSMAN COUNTY, APPELLANT,

vs.

CHARLES S. WALLACE, AND JAMES M. MARTIN AS ASSIGNEE OF DANIEL H. WALLACE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED SEPTEMBER 6, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1076.

STUTSMAN COUNTY, APPELLANT,

vs.

CHARLES S. WALLACE, AND JAMES M. MARTIN AS ASSIGNEE OF DANIEL H. WALLACE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Notice of appeal	1	1
Summons	3	1
Complaint	4	2
Schedule A—Description of lands, &c.	14	7
B— " "	29	16
Sheriff's return on summons and complaint	41	24
Demurrer	42	25
Order granting leave to withdraw demurrer	44	26
Order denying motion for judgment for defendant	44	26
Answer	46	27
Stipulation of facts	47	27
Motion for judgment for defendant	58	33
Findings of fact and conclusions of law	59	34
Judgment	61	35
Exceptions to orders and decision	63	36
Motion for new trial	65	37
Order denying motion for new trial	66	37
Judge's certificate	67	38
Clerk's certificate	68	39
Assignment of errors	69	39
Judgment	71	40
Stipulation as to costs	73	41
Motion for taxation of costs	74	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 29, 1889.

of such service, and if you shall fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of sixteen thousand five hundred dollars, with interest at the rate of thirty per cent. per annum from the first day of October, A. D. 1882, on ten thousand five hundred dollars, and at the same rate from the first day of October, A. D. 1883, on six thousand dollars, together with the costs and disbursements of this action.

Dated at Jamestown, D. T., September 28th, 1886.

DODGE AND CAMP,
Plaintiffs' Attorneys, Jamestown, Dakota Territory.

4 District Court, Sixth Judicial District.

TERRITORY OF DAKOTA, }
County of Stutsman. }

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs,
v.
STUTSMAN COUNTY, Defendant. } Complaint.

The plaintiffs, complaining of the defendant, allege the following facts constituting their cause of action:

I.

That the defendant is a corporation organized and existing under the laws of Dakota Territory.

The Northern Pacific Railroad Company is a corporation duly organized and existing under that certain act of Congress, approved July 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and under those subsequent acts of Congress relating to the same subject-matter.

II.

Under and in pursuance of the said several acts and joint resolutions of Congress the said company has built and caused to be built and put into operation a continuous line of railroad and telegraph extending from the waters of Lake Superior westwardly across the State of Minnesota and across this Territory, and of the char-
5 acter and material specified in the said acts and joint resolutions.

III.

At the time of the passage of the said act of Congress, and at the time of the definite location of that portion of the said line of railroad and telegraph lying opposite the several parcels of land particularly described in the schedule hereunto annexed (marked, re-

spectively "A" and "B," which schedules and the statement contained therein are made part of this complaint), all said parcels of land were part of the public domain of the United States, and none of the same had ever been reserved, sold, granted, or otherwise appropriated, and all the same were free of pre-emption and other claims and rights, and all the same were situated within the distance of forty miles of the said line of railroad; by reason of which facts the said company had acquired the interest in all said lands conferred and intended to be conferred upon it by the several acts of Congress relating thereto.

IV.

In the year A. D. 1880 the officers of the said county authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes thereon pretended to assess all the said parcels of land mentioned in said Schedule "A" for the purposes of taxation, and pretended to levy certain taxes thereon, to wit, the territorial, county, town, school, and other taxes, for those years, amounting in the aggregate to fifty-five hundred dollars.

V.

All the said pretended taxes were and are illegal and
6 void for the reasons and on account of the facts following—
that is to say:

First. None of the said lands have ever been taxable by the officers of the said county nor by any board of officers holding office under the laws of this Territory, for the reason that before the definite location or construction of any part of the said railroad within this Territory and on July 15, A. D. 1870, the Congress of the United States passed an act, on that day approved by the President of the United States, entitled "An act making appropriations for sundry civil expenses of the Government for the year ending June 30, 1871, and for other purposes," in and by which it was, among other things, enacted and provided as follows—that is to say:

"For the survey of the public lands within the limits of the land grant of the Northern Pacific Railroad Company, in a direct line extending from Duluth, on Lake Superior, to Georgetown, on the Red River of the North, $95,980: Provided, That $5,000 of this appropriation shall be expended for office work by the surveyor general of Minnesota: And provided further, That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest."

The said act of Congress has never been repealed, and since the passage thereof and long before the levy of said pretended
7 taxes the Government of the United States had expended large sums of money, amounting in the aggregate to more than $100,000, in surveying the lands lying within this Territory,

granted and intended to be granted in and by said acts and joint resolutions of Congress, including the lands described in the annexed schedules, no part whereof had at the time of said assessment been repaid by the Northern Pacific Railroad Company or any other party in interest; by reason whereof the said Government has, ever since the incurring of said expenses, claimed and then claimed a lien upon all the lands covered by the said surveys, including the lands described in the said annexed schedules, for the amount of such surveying expenses, and it has refused and at the times of the said assessments did refuse to convey any of said lands, including the lands described in the said schedule, to the said company, and no patents for said lands or any of the same have ever been issued by the officers of the United States to the Northern Pacific Company or its assigns.

VI.

That, notwithstanding the premises, the county treasurer of said county heretofore, to wit, on the first day of October, A. D. 1882, by mistake and supposing said lands to be subject to taxation, did offer all and singular the said lands for sale to satisfy the said pretended taxes assessed for the year A. D. 1880 and struck the same off and pretended to sell the same to the plaintiff, Charles S. Wallace, who then and there supposed said lands and all thereof to be taxable and such lands as said treasurer was by law authorized to sell, and said plaintiff, Charles S. Wallace, then and there bid and paid
8 for said lands to said treasurer, and for each and every separate piece and parcel thereof the sum designated by the figures set opposite the description thereof in said Schedule "A" in the column of figures under the words "consideration of sale," written at the commencement of said schedule, amounting in the aggregate to the sum of five thousand five hundred dollars, and thereupon said county treasurer made out and delivered to the said purchaser certificates, under his hand, in the form set forth in section sixty-seven (67) of chapter twenty-eight of the Political Code of this Territory, wherein and whereby he, the said county treasurer, certified, in substance, among other things, that the several parcels of land had been sold by him, the said county treasurer, for the taxes of the year A. D. 1880, in the manner provided by law, to the said purchaser, and that unless redemption thereof should be made in manner provided by law the said purchaser or his assigns would be entitled to a deed thereof, on and after certain dates therein specified, on surrender of such certificates.

VII.

That in the year A. D. 1881 the officers of the said county authorized by law to assess property therein for the purposes of taxation and to levy taxes thereon, again wrongfully assessed each and every the said parcels of land described in said Schedule "A," and the said plaintiff, Charles S. Wallace, in order to protect his tax lien thereon and equitable title thereto, heretofore paid to the defendant's treasurer, as subsequent taxes upon said lands and upon each and every

parcel thereof, to wit, on the first day of October, 1882, the
9 sum of money designated by the figures set opposite the description of said lands in said schedule in the column of figures under the words "subsequent tax paid," amounting in the aggregate to the sum of five thousand dollars.

VIII.

In the year A. D. 1882 the officers of the said county authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes thereon pretended to assess all the said parcels of land described in said Schedule "B" for the purposes of taxation, and pretended to levy certain taxes thereon, to wit, the territorial, county, town, school, and other taxes for that year, amounting in the aggregate to six thousand dollars, and that all of said pretended taxes were and are illegal and void, for the reason set forth in paragraph V of this complaint.

IX.

Notwithstanding the premises, the county treasurer of said county heretofore, to wit, on the first day of October, A. D. 1883, by mistake and supposing said lands to be subject to taxation, did offer all and singular the said lands for sale to satisfy the said pretended taxes assessed for the year A. D. 1882, and struck the same off and pretended to sell the same to the plaintiff, Charles S. Wallace, who then and there supposed said lands and all thereof to be taxable and such lands as said treasurer was by law authorized to sell, and said plaintiff, Charles S. Wallace, then and there bid and paid for said lands to said treasurer, and for each and every separate piece and parcel thereof the sum of money designated by the figures set opposite the description thereof in said Schedule "B" in the column of
10 figures under the words "consideration of sale," written at the commencement of said schedule, amounting in the aggregate to the sum of six thousand dollars, and thereupon said county treasurer made out and delivered to the said purchaser certificates, under his hand, in the form set forth in section sixty-seven (67) of chapter twenty-eight (28) of the Political Code of this Territory, wherein and whereby he, the said county treasurer, certified, in substance, among other things, that the several parcels of land had been sold by him, the said county treasurer, for the taxes of the year A. D. 1882, in the manner provided by law, to the said purchasers, and that unless redemption thereof should be made in manner provided by law the said purchasers or their assigns would be entitled to a deed thereof, on and after certain dates therein specified, on surrender of such certificates.

X.

That in the year A. D. 1884 and prior to the commencement of this action said plaintiff, Charles S. Wallace, for a valuable consideration, sold, assigned, and set over unto said plaintiff, James M.

Martin, as assignee of said Daniel H. Wallace, an interest in said certificates and each and *in* every of them and in the moneys so wrongfully and by mistake paid to said defendant by the plaintiff for the purchase of said lands at said tax sales and for the payment of said subsequent taxes, and that the plaintiffs now are the holders and owners of said certificates and lawfully entitled to such moneys.

XI.

That prior to the commencement of this action and in the month of September, A. D. 1886, the plaintiffs tendered to
11 said county and to the board of county commissioners thereof, at a duly appointed meeting of said board, the said tax certificates hereinbefore mentioned and all of them, and offered to surrender said certificates to said county upon the payment of the amount so paid by said plaintiff, Charles S. Wallace, for the purchase of said lands at said sales and for the payment of the subsequent taxes thereon, as aforesaid, together with interest thereon, at the rate of thirty per cent. per annum, from the dates of such payments; that defendant then and there refused and neglected and still does refuse and neglect to pay to the plaintiffs such amount or any part thereof, and that the whole thereof is still due and unpaid.

XII.

That heretofore, to wit, on the thirteenth day of August, A. D. 1886, in the said district court of the sixth judicial district in and for said Stutsman county, a judgment was duly given and made by said court in favor of said Northern Pacific Railroad Company and against said plaintiff, Charles S. Wallace, and the county treasurer of said county, in and by which judgment it was, among other things, adjudged and decreed that the tax proceedings hereinbefore referred to be, and the same were thereby, adjudged to be null and void, and that the said Charles S. Wallace be forever restrained and enjoined from in any manner setting up or claiming title to any of the premises in said schedules described under or through or by means of said tax proceedings or any of them, and that the treasurer of said county and his successors be, and they were thereby,
12 forever restrained and enjoined from executing to any person, natural or corporate, any tax deed or deeds covering or conveying, or purporting to cover or convey, any of said lands described in said schedules based upon or growing out of any sale or sales of said parcels of land or of any of them made, in whole or in part, to enforce the payment of any of the taxes hereinbefore mentioned.

XIII.

That no part of said lands has ever been redeemed from said pretended sales nor from either of them, nor from said subsequent taxes so paid as aforesaid, and that by reason of the premises the defendant is indebted to the plaintiffs on account of the moneys so paid at said pretended sale, made on the first day of October, 1882, of the

lands described in said Schedule "A," in the sum of five thousand five hundred dollars, with interest thereon at the rate of thirty per cent. per annum from said date; and on account of the moneys so paid for subsequent taxes on the lands described in said Schedule "A," in the sum of five thousand dollars, with interest thereon at the rate of thirty per cent. per annum from the first day of October, 1882; and on account of the moneys so paid at said pretended sale, made on the first day of October, 1883, of the lands described in said Schedule "B," in the sum of six thousand dollars, with interest thereon at the rate of thirty per cent. per annum from said last-named day.

Wherefore the plaintiffs demand judgment agains the defendant for the sum of sixteen thousand five hundred dollars, with interest on ten thousand five hundred dollars at the rate of thirty per cent. per annum from the first day of October, A. D. 1882, and on the six thousand dollars, at the same rate, from the first day of October, A. D. 1883.

13 DODGE & CAMP,
Plaintiffs' Attorneys.

Dated at Jamestown, Dakota, September 29, A. D. 1886.

NOTE.—In the annexed schedule, N. stands for north, S. stands for south, E. stands for east, W. stands for west, N. E. stands for northeast, N. W. stands for northwest, S. E. stands for southeast, S. W. stands for southwest.

(Indorsements:) Filed in the office of clerk dis't court for Stutsman county, Dakota Ter., October 30, 1886. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

14 SCHEDULE A.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
Township 137, range 68:					
All of section 1	Oct., 1882	$16 48	$11 59	$31 61	$59 68
All of section 3	Oct., 1882	16 48	11 59	31 61	59 68
All of section 5	Oct., 1882	16 48	11 59	31 61	59 68
All of section 7	Oct., 1882	16 48	11 59	31 61	59 68
All of section 9	Oct., 1882	16 48	15 42	35 88	67 78
All of section 11	Oct., 1882	16 48	11 59	31 61	59 68
All of section 13	Oct., 1882	16 48	11 59	31 61	59 68
All of section 15	Oct., 1882	16 48	11 59	31 61	59 68
All of section 17	Oct., 1882	16 48	11 59	31 61	59 68
All of section 19	Oct., 1882	16 48	11 59	31 61	59 68
All of section 21	Oct., 1882	16 48	11 59	31 61	59 68
All of section 23	Oct., 1882	16 48	11 59	31 61	59 68
All of section 25	Oct., 1882	16 48	15 42	35 88	67 78
All of section 27	Oct., 1882	16 48	11 59	31 61	59 68

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
All of section 29	Oct., 1882	$16 48	$11 59	$31 61	$59 68
All of section 31	Oct., 1882	16 48	11 59	31 61	59 68
All of section 33	Oct., 1882	16 48	11 59	31 61	59 68
All of section 35	Oct., 1882	16 48	11 59	31 61	59 68
Town. 139, range 68:					
All of section 1	Oct., 1882	16 48	11 59	31 61	59 68
All of section 3	Oct., 1882	16 48	11 59	31 61	59 68
15 ½ of section 5	Oct., 1882	8 24	5 80	15 84	29 88
All of section nine	Oct., 1882	16 48	11 59	31 61	59 68
All of section 11	Oct., 1882	16 48	11 59	31 61	59 68
All of section 15	Oct., 1882	16 48	11 59	31 61	59 68
All of section 17	Oct., 1882	16 48	11 59	31 61	59 68
All of section 19	Oct., 1882	16 48	11 59	31 61	59 68
All of section 23	Oct., 1882	16 48	11 59	31 61	59 68
All of section 25	Oct., 1882	16 48	11 59	31 61	59 68
All of section 29	Oct., 1882	16 48	11 59	31 61	59 68
All of section 31	Oct., 1882	16 48	11 59	31 61	59 68
Township 140, range 68:					
All of section 3	Oct., 1882	24 67	11 59	40 79	77 05
All of section 5	Oct., 1882	24 67	11 59	40 79	77 05
All of section 7	Oct., 1882	24 67	11 59	40 79	77 05
All of section 9	Oct., 1882	24 67	11 59	40 79	77 05
All of section 13	Oct., 1882	24 67	11 59	40 79	77 05
All of section 17	Oct., 1882	24 67	11 59	40 79	77 05
All of section 19	Oct., 1882	24 67	11 59	40 79	77 05
All of section 21	Oct., 1882	24 67	11 59	40 79	77 05
All of section 23	Oct., 1882	24 67	11 59	40 79	77 05
All of section 25	Oct., 1882	24 67	11 59	40 79	77 05
All of section 27	Oct., 1882	24 67	11 59	40 79	77 05
All of section 29	Oct., 1882	24 67	11 59	40 79	77 05
All of section 33	Oct., 1882	24 67	15 95	43 98	83 07
All of section 35	Oct., 1882	24 67	15 42	43 90	82 99
		831 54	520 02		
16 Township 141, range 68:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 11	Oct., 1882	16 48	17 06	37 73	71 27
All of section 13	Oct., 1882	16 48	17 06	37 73	71 27
All of section 15	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 23	Oct., 1882	16 48	17 06	37 73	71 27
All of section 25	Oct., 1882	16 48	17 06	37 73	71 27
All of section 27	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct.. 1882	16 48	17 06	37 73	71 27

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
All of section 33	Oct., 1882	$16 48	$17 06	$37 73	$71 27
All of section 35	Oct., 1882	16 48	17 06	37 73	71 27
Township 142, range 68:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 11	Oct., 1882	16 48	17 06	37 73	71 27
All of section 13	Oct., 1882	16 48	17 06	37 73	71 27
All of section 15	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
17 All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 23	Oct., 1882	16 48	17 06	37 73	71 27
All of section 25	Oct., 1882	16 48	17 06	37 73	71 27
All of section 27	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27
All of section 35	Oct., 1882	16 48	17 06	37 73	71 27
Township 143, range 68:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 11	Oct., 1882	16 48	17 06	37 73	71 27
All of section 13	Oct., 1882	16 48	17 06	37 73	71 27
All of section 15	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 23	Oct., 1882	16 48	17 06	37 73	71 27
All of section 25	Oct., 1882	16 48	17 06	37 73	71 27
All of section 27	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27
All of section 35	Oct., 1882	16 48	17 06	37 73	71 27
		889 92	921 24		
18 Township 144, range 67:					
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 15	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 23	Oct., 1882	16 48	17 06	37 73	71 27
All of section 25	Oct., 1882	16 48	17 06	37 73	71 27

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
All of section 27	Oct., 1882	$16 48	$17 06	$37 73	$71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27
All of section 35	Oct., 1882	16 48	17 06	37 73	71 27
Township 143, range 67:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 11	Oct., 1882	16 48	17 06	37 73	71 27
All of section 13	Oct., 1882	16 48	17 06	37 73	71 27
All of section 15	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 23	Oct., 1882	16 48	17 06	37 73	71 27
19 All of section 25	Oct., 1882	16 48	17 06	37 73	71 27
All of section 27	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27
All of section 35	Oct., 1882	16 48	17 06	37 73	71 27
Township 138, range 67:					
All of section 27	Oct., 1882	16 48	15 42	35 88	67 78
Town. 144, range 66:					
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 9	Oct., 1882	16 48	17 06	37 73	71 27
All of section 31	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	12 91	12 80	28 21	53 30
Township 143, range 66:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	17 06	37 73	71 27
All of section 5	Oct., 1882	16 48	17 06	37 73	71 27
All of section 7	Oct., 1882	16 48	17 06	37 73	71 27
All of section 11	Oct., 1882	16 48	17 06	37 73	71 27
All of section 17	Oct., 1882	16 48	17 06	37 73	71 27
All of section 19	Oct., 1882	16 48	17 06	37 73	71 27
All of section 25	Oct., 1882	16 48	17 06	37 73	71 27
All of section 29	Oct., 1882	16 48	17 06	37 73	71 27
20 All of section 21	Oct., 1882	16 48	17 06	37 73	71 27
All of section 33	Oct., 1882	16 48	17 06	37 73	71 27

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
Township 141, range 66:					
All of section 1	Oct., 1882	$20 58	$22 71	$48 70	$91 99
All of section 5	Oct., 1882	20 58	22 71	48 70	91 99
All of section 7	Oct., 1882	20 58	22 71	48 70	91 99
All of section 9	Oct., 1882	20 58	22 71	48 70	91 99
All of section 13	Oct., 1882	20 58	22 71	48 70	91 99
All of section 15	Oct., 1882	20 58	22 71	48 70	91 99
All of section 17	Oct., 1882	20 58	22 71	48 70	91 99
All of section 23	Oct., 1882	20 58	22 71	48 70	91 99
All of section 27	Oct., 1882	20 58	22 71	48 70	91 99
All of section 35	Oct., 1882	20 58	22 71	48 70	91 99
W. ½ 31	Oct., 1882	10 34	11 41	24 35	46 10
All of section 25	Oct., 1882	20 58	22 71	48 70	91 99
N. E. ¼ N. ½ of N. W. ¼, section 21	Oct., 1882	7 78	13 52	23 90	45 20
Township 139, range 66:					
All of section 29	Oct., 1882	20 58	.....	23 13	43 71
S. ½, section —					
All of section 15	Oct., 1882	20 58	11 59	36 19	68 36
All of section 27	Oct., 1882	20 58	15 42	40 48	76 48
N. E. ¼, section 13	Oct., 1882	7 21	4 83	13 50	25 54
Township 144, range 65:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
All of section 3	Oct., 1882	16 48	.....	18 52	35 00
All of section 13	Oct., 1882	16 48	11 40	31 29	59 17
All of section 25	Oct., 1882	16 48	11 40	31 29	59 17
Township 143, range 65:					
All of section 1	Oct., 1882	16 48	17 06	37 73	71 27
W. ½ S. W. & N. W. ¼ & S. E. ¼, section 7	Oct., 1882	10 34	.....	11 64	21 98
W. ½ N. W. ¼, S. ½ N. E., & S. ½, section 7	Oct., 1882	16 99	.....	19 11	36 10
E. ½ of section 25	Oct., 1882	18 66	20 59	44 16	83 41
S. E. ¼, section 31	Oct., 1882	4 42	3 14	8 47	16 03
E. ½, section 9	Oct., 1882	8 29	.....	9 32	17 61
N. W. ¼ of S. E. ¼, sec. 13	Oct., 1882	9 29	.....	10 29	19 58
N. W. ¼ of N. E., sec. 13	Oct., 1882	9 60	.....	10 50	20 10
Township 142, range 65:					
S. E. ¼, section 19	Oct., 1882	5 22	5 38	11 92	22 52
S. W. ¼ S. ½, S. E. ¼ N. W., & S. E. ¼, section 31	Oct., 1882	9 06	11 67	23 31	44 04
N. ½, section 29	Oct., 1882	10 29	13 27	26 50	50 06
N. W. ¼, section 5	Oct., 1882	5 18	6 66	13 26	25 10
W. ½ N. W. & S. ½	Oct., 1882	19 54	.....	21 88	41 42
Township 140, range 65:					
S. W. ¼ and N. W. of S. E., section 29	Oct., 1882	10 25	12 00	25 09	47 34

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
Township 139, range 65:					
S. ½ S. E. & S. ½ S. W., 31	Oct., 1882	$6 24	$4 03	$11 50	$21 77
S. ½ N. E. & S. E. of S. E. of section 33	Oct., 1882	4 62	5 01	10 78	20 41
		560 82	467 47		
22 Township 137, range 65:					
All of section 3	Oct., 1882	16 48	15 42	35 72	67 62
Township 144, range 64:					
All of section 33	Oct., 1882	16 48	22 71	43 90	83 09
S. ½, section 11	Oct., 1882	8 24	11 35	21 94	41 53
S. ½, section 27	Oct., 1882	8 24	11 43	21 95	41 62
S. ½ & N. W. ¼, sec. 29	Oct., 1882	12 32	17 00	32 83	62 15
All of section 3	Oct., 1882	16 48	22 71	43 90	83 09
All of section 7	Oct., 1882	16 48	22 71	43 90	83 09
All of section 9	Oct., 1882	16 48	22 71	43 90	83 09
All of section 13	Oct., 1882	16 48	22 71	43 90	83 09
All of section 25	Oct., 1882	16 48	22 71	43 90	83 09
All of section 35	Oct., 1882	16 48	22 71	43 90	83 09
All of section 19	Oct., 1882	16 48	11 70	31 56	59 74
All of section 31	Oct., 1882	16 48	16 96	37 45	70 89
Township 143, range 64:					
W. ½ of section 3	Oct., 1882	8 24	14 18	25 11	47 53
All of section 25	Oct., 1882	16 48	22 71	43 90	83 09
All of section 7	Oct., 1882	16 48	22 71	43 90	83 09
All of section 1	Oct., 1882	16 48	28 37	50 23	95 08
All of section 5	Oct., 1882	16 48	22 71	43 90	83 09
All of section 19	Oct., 1882	16 48	17 07	37 73	71 27
All of 29 except S. ½ of N. W. ¼ & S. W. ¼ & lots 4, 5 & 6	Oct., 1882	13 70	9 50	25 98	49 18
N. W. ¼ & W. ½ of E. ½ of section 33	Oct., 1882	8 26	11 31	21 92	41 49
23 N. E. ¼, section 23	Oct., 1882	4 12	5 68	10 96	20 76
N. ½ & S. E. ¼, sec. 21	Oct., 1882	12 36	12 81	12 19	53 36
Township 142, range 64:					
All of section 33	Oct., 1882	32 95	-------	36 90	69 85
N. ½, section 13	Oct., 1882	12 38	-------	13 86	26 24
N. E. ¼, section 11	Oct., 1882	6 24	6 71	14 40	27 35
E. ½ & W. ½ N. W. ¼ & N. ½ S. W. ¼, sec. 35	Oct., 1882	18 52	13 68	36 06	68 26
W. ½ & E. ½ of E. ½ of section 15	Oct., 1882	18 50	-------	-------	-------
E. ½ & N. W. ¼, 25	Oct., 1882	18 50	15 90	38 53	72 93
Township 141, range 64:					
All of section 1	Oct., 1882	32 86	15 96	54 79	103 71
E. ½ of N. E. ¼, E. ½ S. E. ¼, W. ½ of W. ½	Oct., 1882	16 85	8 03	27 86	52 74
S. E. ¼, W. ½ N. W. ¼, section 25	Oct., 1882	12 38	-------	13 87	26 25
E. ½, section 13	Oct., 1882	16 43	5 33	24 37	46 13

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 30 p'r cent.	Total.
Township 140, range 64:					
E. ¼ N. W. ¼, E. ½ S. W. ¼ of section 13	Oct., 1882	$10 34	.....	$11 58	$21 92
Township 139, range 64:					
N. ½ N. W. ¼, sec. 25	Oct., 1882	4 19	.....	4 69	8 88
Township 138, range 64:					
N. W. of N. W. of 1	Oct., 1882	1 63	1 75	3 78	7 16
S. W. of N. W. & N. W. of S. W. of section 7	Oct., 1882	3 27	4 06	8 21	15 54
24 W. ½ S. W. of 19	Oct., 1882	3 27	3 40	7 47	14 14
Township 137, range 64:					
All of section 9	Oct., 1882	16 48	.....	18 46	34 94
All of section 15	Oct., 1882	16 48	.....	18 46	34 94
All of section 11	Oct., 1882	16 48	.....	18 46	34 94
E. ½ & N. W. of N. W., 35	Oct., 1882	9 51	14 97	27 19	51 47
Township 144, range 63:					
All of section 1	Oct., 1882	16 48	22 71	43 90	83 09
All of section 3	Oct., 1882	16 48	22 71	43 90	83 09
All of section 5	Oct., 1882	16 48	22 71	43 90	83 09
All of section 7	Oct., 1882	16 48	22 71	43 90	83 09
All of section 15	Oct., 1882	16 48	22 71	43 90	83 09
All of section 19	Oct., 1882	16 48	22 71	43 90	83 09
All of section 23	Oct., 1882	16	22 71	43 90	83 09
All of section 25	Oct., 1882	16 48	22 71	43 90	83 09
All of section 35	Oct., 1882	16 48	22 71	43 90	83 09
Township 143, range 63:					
All of section 1	Oct., 1882	20 58	23 50	49 37	93 45
All of section 3	Oct., 1882	20 58	23 50	49 37	93 45
All of section 5	Oct., 1882	20 58	23 50	49 37	93 45
All of section 9	Oct., 1882	20 50	22 71	48 40	91 61
All of section 11	Oct., 1882	20 50	22 71	48 40	91 61
All of section 13	Oct., 1882	20 58	22 71	48 48	91 77
All of section 15	Oct., 1882	20 58	22 71	48 48	91 77
All of section 17	Oct., 1882	20 58	22 71	48 48	91 77
All of section 21	Oct., 1882	20 58	22 71	48 48	91 77
All of section 23	Oct., 1882	20 58	22 71	48 48	91 77
All of section 25	Oct., 1882	20 58	22 71	48 48	91 77
25 All of section 27	Oct., 1882	20 58	22 71	48 48	91 77
All of section 31	Oct., 1882	20 58	22 71	48 48	91 77
All of section 33	Oct., 1882	20 58	22 71	48 48	91 77
All of section 35	Oct., 1882	20 58	22 71	48 48	91 77
Township 142, range 63:					
N. E. ¼ & E. ½ N. W.	Oct., 1882	16 47	9 24	28 80	54 51
N. ½ & S. W. ¼ of 13	Oct., 1882	18 51	17 62	40 47	76 60
W. ½, section 25	Oct., 1882	12 33	11 75	26 97	51 05
E. ½, section 5	Oct., 1882	11 80	.....	13 21	25 01
All of section 7	Oct., 1882	24 67	23 50	53 95	102 12
All of section 9	Oct., 1882	24 67	23 50	53 95	102 12

Schedule A—Continued.

Description of land.	Date of sale.	Consideration	Subsequent tax paid	Accrued interest at 30 per cent.	Total.
All of section 11	Oct., 1882	$24 67	$23 50	$53 95	$102 12
All of section 15	Oct., 1882	24 67	23 50	53 95	102 12
All of section 17	Oct., 1882	24 67	23 50	53 95	102 12
All of section 21	Oct., 1882	24 67	23 50	53 95	102 12
All of section 23	Oct., 1882	24 67	23 50	53 95	102 12
All of section 27	Oct., 1882	24 67	23 50	53 95	102 12
All of section 33	Oct., 1882	24 67	23 50	53 95	102 12
N. ½ & S. E. ¼ 29	Oct., 1882	18 52	17 56	41 42	76 51
Township 142, range 65:					
All of section 7	Oct., 1882	20 58	22 54	48 29	91 41
All of section 19	Oct., 1882	20 58	22 71	48 48	91 77
All of section 29	Oct., 1882	20 58	22 71	48 48	91 77
Township 143, range 63:					
All of section 7	Oct., 1882	20 58	22 54	48 29	91 41
All of section 19	Oct., 1882	20 58	22 71	48 48	91 77
All of section 29	Oct., 1882	20 58	22 71	48 48	91 77
26 Township 141, range 62:					
All of section 1	Oct., 1882	32 86	22 69	62 21	117 76
N. ½ S. W. ¼ section 21	Oct., 1882	24 67	8 58	37 24	70 49
N. E. ¼, E. ½ of S. E. ¼ section 23	Oct., 1882	12 38	13 43	28 90	54 71
N. ½ & S. E. ¼ of 5	Oct., 1882	21 28	24 65	50 44	96 37
E. ½ N. W. ¼, sec. 31	Oct., 1882	4 11	.....	4 60	8 71
Township 139, range 63:					
W. ½ S. E. ¼, section 13	Oct., 1882	5 70	.....	6 38	12 08
W. ½ & N. E. ¼, sec. 29	Oct., 1882	24 67	.....	27 63	52 30
S. W. ¼, S. W. of S. E. of 23	Oct., 1882	10 34	.....	11 58	21 92
N. E. ¼ & S. ½ S. W., section 1	Oct., 1882	12 38	10 65	25 81	48 86
S. E. ¼ & S. ½ S. W., 9	Oct., 1882	12 38	2 22	16 39	30 95
S. W. ¼, S. ½, S. E. of 11	Oct., 1882	12 38	8 58	23 47	44 43
S. W. ¼ & S. ½ N. E. ¼ and N. E. of N. E. of 7	Oct., 1882	16 21	4 34	23 01	43 56
Township 138, range 63:					
N. ½ S. E., N. E. of S. E. of section 25	Oct., 1882	4 70	5 40	11 31	22 41
N. E. ¼, section 29	Oct., 1882	6 19	7 16	14 95	28 30
Township 137, range 63:					
N. W. of N. E. of 15	Oct., 1882	1 56	.....	1 62	3 18
E. ½, section 9	Oct., 1882	8 29	7 16	17 30	32 75
27 Township 142, range 62:					
All of section 21	Oct., 1882	20 58	22 69	48 46	91 73
All of section 17	Oct., 1882	20 58	28 37	55 04	104 00
All of section 9	Oct., 1882	20 58	28 37	55 04	104 00
All of section 5	Oct., 1882	20 42	22 69	48 28	91 39
All of section 15	Oct., 1882	20 59	28 37	55 04	104 00
All of section 7	Oct., 1882	20 09	28 37	54 27	102 73
S. ½ & N. E ¼ of 3	Oct., 1882	18 51	.....	20 82	39 33
N. ½ of section 19	Oct., 1882	10 08	11 34	24 10	45 52

Schedule A—Continued.

Description of land.	Date of sale.	Consideration.	Subsequent tax paid.	Accrued interest at 50 per cent.	Total.
Township 141, range 62:					
S. W. ¼ & S. ½ N. W. ¼, section 9	Oct., 1882	$9 25	$8 52	$19 99	$37 76
E. ½ & E. ½ of W. ½ of section 1	Oct., 1882	18 45	17 06	39 95	75 46
All of section 5	Oct., 1882	24 29	22 71	52 88	99 88
E. ½ & N. W. ¼, 27	Oct., 1882	18 58	21 30	44 86	84 74
N. E. ¼ of section 25	Oct., 1882	6 19	5 71	13 39	25 39
W. ½ N. E. & S. E. ¼, 31	Oct., 1882	9 27	8 55	20 05	37 87
E. ½ of E. ½, sec. 23	Oct., 1882	6 18	3 63	11 04	20 95
Township 140, range 62:					
S. W. ¼ & N. ½ S. E., 3	Oct., 1882	12 38	10 70	26 00	49 08
Township 139, range 62:					
E. ½ of W. ½, 19	Oct., 1882	6 24	5 75	13 49	25 48
Township 138, range 62:					
All of section 25	Oct., 1882	20 58	22 69	48 68	91 95
All of section 27	Oct., 1882	20 58	22 69	48 68	91 95
All of section 33	Oct., 1882	20 58	28 37	55 04	104 00
28 Township 137, range 62:					
N. E. ¼, section 29	Oct., 1882	7 41		8 33	15 74
N. ½ & S. W. of 21	Oct., 1882	22 04		24 80	46 84
All of section 15	Oct., 1882	28 12		31 63	59 75
S. E. ¼, section 21	Oct., 1882	3 70	7 10	12 15	22 95
All of section 7	Oct., 1882	14 47	28 12	25 41	48 00
All section 5	Oct., 1882	14 31	7 15	24 36	45 82
W. ½ & N. E. of N. E., 23	Oct., 1882	8 75	8 88	19 75	37 30
Township 140, range 64:					
E. ½ & W. ½ & N. W. of S. W. of section 1	Oct., 1882	12 90			
Township 142, range 64:					
Section 3	Oct., 1882	13 92	12 00		
E. ½ of E. ½, N. W. ¼, & N. ½ of S. W. of section 15	Oct., 1882	15 42	7 50		
W. ½ of W. ½ & N. E. of N. E. of section 23	Oct., 1882	7 72	6 71		
Township 142, range 65:					
S. ½ & W. ½ of N. W. of section 33	Oct., 1882	12 86	14 53		

29 SCHEDULE B.

Description of land.	Date of sale.	Consideration.
Township 137, range 68:		
All of section 1	Oct., 1883	18 98
All of section 3	Oct., 1883	18 85
All of section 5	Oct., 1883	18 98
All of seven	Oct., 1883	18 71
All of section 9	Oct., 1883	18 98
All of section 11	Oct., 1883	18 98
All of section 13	Oct., 1883	18 98
All of section 15	Oct., 1883	18 98
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 77
All of section 21	Oct., 1883	18 98
All of section 23	Oct., 1883	18 98
All of section 25	Oct., 1883	18 98
All of section 27	Oct., 1883	18 98
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18, 91
All of section 33	Oct., 1883	18 98
All of section 35	Oct., 1883	18 98
Township 139, range 68:		
All of section 1	Oct., 1883	28 42
All of section 3	Oct., 1883	28 44
S. ½ of section 5	Oct., 1883	14 25
All of section 9	Oct., 1883	28 37
All of section 11	Oct., 1883	28 37
All of section 15	Oct., 1883	28 37
All of section 17	Oct., 1883	28 37
All of section 19	Oct., 1883	27 70
All of section 23	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
All of section 29	Oct., 1883	28 37
All of section 31	Oct., 1883	27 70
Township 140, range 68:		
All of section 3	Oct., 1883	29 92
All of section 5	Oct., 1883	24 75
All of section 7	Oct., 1883	22 66
All of section 9	Oct., 1883	23 68
All of section 13	Oct., 1883	23 68
All of section 17	Oct., 1883	23 68
All of section 19	Oct., 1883	27 33
All of section 21	Oct., 1883	28 37

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
All of section 23	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
All of section 27	Oct., 1883	28 37
All of section 29	Oct., 1883	28 37
N. E. — of section 31	Oct., 1883	6 48
All of section 33	Oct., 1883	26 16
All of section 35	Oct., 1883	26 16
Township 141, range 68:		
All of section 1	Oct., 1883	19 10
All of section 3	Oct., 1883	19 51
All of section 5	Oct., 1883	19 27
All of section 7	Oct., 1883	14 94
All of section 9	Oct., 1883	18 98
31 All of section 11	Oct., 1883	18 98
All of section 13	Oct., 1883	18 98
All of section 15	Oct., 1883	18 98
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 98
All of section 21	Oct., 1883	18 98
All of section 25	Oct., 1883	18 98
All of section 27	Oct., 1883	18 98
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18 98
All of section 33	Oct., 1883	18 98
All of section 35	Oct., 1883	18 98
Township 142, range 68:		
All of section 1	Oct., 1883	18 98
All of section 3	Oct., 1883	19 04
All of section 5	Oct., 1883	19 12
All of section 7	Oct., 1883	18 53
All of section 9	Oct., 1883	18 98
All of section 11	Oct., 1883	18 98
All of section 13	Oct., 1883	18 98
All of section 15	Oct., 1883	18 98
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 55
All of section 21	Oct., 1883	18 98
All of section 23	Oct., 1883	18 98
All of section 25	Oct., 1883	18 98
All of section 27	Oct., 1883	18 98
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18 59

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
32 All of section 33	Oct., 1883	18 98
All of section 35	Oct., 1883	17 21
Township 143, range 68:		
All of section 3	Oct., 1883	18 97
All of section 5	Oct., 1883	18 97
All of section 7	Oct., 1883	18 97
All of section 9	Oct., 1883	18 97
All of section 11	Oct., 1883	18 97
All of section 13	Oct., 1883	18 97
All of section 15	Oct., 1883	18 97
All of section 17	Oct., 1883	18 97
All of section 19	Oct., 1883	18 97
All of section 21	Oct., 1883	18 97
All of section 23	Oct., 1883	18 97
All of section 25	Oct., 1883	18 97
All of section 27	Oct., 1883	18 97
All of section 29	Oct., 1883	18 97
All of section 31	Oct., 1883	18 97
All of section 33	Oct., 1883	18 97
All of section 35	Oct., 1883	18 97
All of section 1	Oct., 1883	18 97
Township 144, range 67:		
All of section 5	Oct., 1883	18 97
All of section 7	Oct., 1883	18 98
All of section 9	Oct., 1883	18 98
All of section 15	Oct., 1883	18 98
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 98
33 All of section 21	Oct., 1883	18 98
All of section 23	Oct., 1883	18 98
All of section 27	Oct., 1883	18 98
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18 98
All of section 33	Oct., 1883	18 98
All of section 35	Oct., 1883	18 98
W. ½, section 25	Oct., 1883	9 60
Township 143, range 67:		
All of section 1	Oct., 1883	18 98
All of section 3	Oct., 1883	18 98
All of section 5	Oct., 1883	18 98

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
All of section 7	Oct., 1883	18 98
All of section 9	Oct., 1883	18 98
All of section 11	Oct., 1883	18 98
All of section 13	Oct., 1883	18 98
All of section 15	Oct., 1883	18 98
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 98
All of section 21	Oct., 1883	18 98
All of section 23	Oct., 1883	18 98
All of section 25	Oct., 1883	18 98
All of section 27	Oct., 1883	18 98
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18 98
All of section 33	Oct., 1883	18 98
All of section 35	Oct., 1883	18 98
Township 138, range 67:		
All of section 27	Oct., 1883	18 98
Township 144, range 66:		
All of section 17	Oct., 1883	28 37
All of section 19	Oct., 1883	26 67
All of section 29	Oct., 1883	28 37
All of section 31	Oct., 1883	28 37
All of section 33	Oct., 1883	28 37
Township 143, range 66:		
All of section 3	Oct., 1883	28 41
All of section 5	Oct., 1883	28 49
All of section 7	Oct., 1883	18 09
All of section 17	Oct., 1883	18 98
All of section 19	Oct., 1883	18 03
All of section 25	Oct., 1883	28 37
All of section 29	Oct., 1883	18 98
All of section 31	Oct., 1883	18 10
All of section 33	Oct., 1883	18 98
W. ½ & S. E. ¼ of section 11	Oct., 1883	21 32
Township 141, range 66:		
All of section 1	Oct., 1883	28 21
All of section 5	Oct., 1883	28 51
All of section 7	Oct., 1883	27 66
All of section 9	Oct., 1883	28 37

Schedule B—Continued.

Description of land.	Date of sale.	Considera-tion.
All of section 13	Oct., 1883	28 37
All of section 15	Oct., 1883	28 37
All of section 17	Oct., 1883	28 37
N. ½ of N. W. ¼, section 21	Oct., 1883	3 71
All of section 27	Oct., 1883	28 37
All of section 31	Oct., 1883	28 38
All of section 33	Oct., 1883	28 37
35 All of section 35	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
Township 140, range 66:		
N. E. ¼, section 13	Oct., 1883	9 49
Township 139, range 66:		
All of section 15	Oct., 1883	37 76
All of section 27	Oct., 1883	37 76
Township 144, range 65:		
All of section 1	Oct., 1883	27 11
All of section 13	Oct., 1883	28 37
All of section 25	Oct., 1883	21 46
Township 143, range 65:		
S. ½ W. ½ N. W. ¼, section 7	Oct., 1883	19 96
N. W. ¼ and W. ½ of E. ½, sec. 13	Oct., 1883	16 56
Township 142, range 65:		
S. W. ¼ W. ½, S. E. ¼, & S. E. of S. E., section 31	Oct., 1883	19 45
S. E. ¼, section 19	Oct., 1883	11 88
N. W. ¼ of section 5	Oct., 1883	11 38
N. ½ of section 29	Oct., 1883	22 52
S. W. ¼ & S. ½ N. E. ¼, sec. 33	Oct., 1883	22 52
Township 140, range 65:		
S. W. ¼, section 29	Oct., 1883	14 22
Township 139, range 65:		
S. ½ S. E. ¼, S. ½ S. W. ¼ of 31	Oct., 1883	11 79
S. ½ N. E. & N. E. of section 33	Oct., 1883	8 88

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
Township 137, range 65:		
All of section 3	Oct., 1883	28 48
All of section 21	Oct., 1883	28 37
Township 144, range 64:		
All of section 35	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
All of section 31	Oct., 1883	28 37
All of section 19	Oct., 1883	28 36
All of section 33	Oct., 1883	28 36
All of section 9	Oct., 1883	28 36
All of section 7	Oct., 1883	28 36
All of section 3	Oct., 1883	28 36
S. ½, section 27	Oct., 1883	14 18
W. ½ & S. ½ S. E. ¼, section 33	Oct., 1883	17 72
S. ½ and N. W. ¼, section 29	Oct., 1883	21 27
S. ½, section 11	Oct., 1883	14 18
Township 143, range 64:		
All of section 5	Oct., 1883	28 37
W. ½, section 3	Oct., 1883	14 32
All of section 7	Oct., 1883	22 94
All of 19, except lots 2, 3, 4, & 5, and N. E. ¼ and S. E. of S. E.	Oct., 1883	6 00
W. ½ of E. ½ & N. W. ¼, sec. 33	Oct., 1883	14 00
All of section 23 except S. ½ & N. W. ¼	Oct., 1883	6 94
N. ½ & S. E. ¼, section 21	Oct., 1883	21 35
Township 142, range 64:		
N. E. ¼ of section 11	Oct., 1883	12 10
37 E. ½ & N. E. of N. W. of section 3	Oct., 1883	27 35
W. ½ of W. ½ & N. E. of N. W., sec. 23	Oct., 1883	14 34
E. ½ of section 25	Oct., 1883	23 80
S. E. ¼, W. ½ N. E., W. ½ N. W. ¼, and N. ½ S. W. of section 35	Oct., 1883	29 95
E. ½ of E. ½, N. W. ¼, N. ½ S. W. of section 15	Oct., 1883	29 95
Township 141, range 64:		
All of section 1	Oct., 1883	66 29
E. ½ of E. ½ & W. ½ of W. ½ of section 11	Oct., 1883	28 16
S. ½ & N. E. of S. E., section 26	Oct., 1883	9 72
E. ½, section 13	Oct., 1883	28 15

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
Township 140, range 64:		
E. ½ of W. ½, section 13	Oct., 1883	14 30
Township 138, range 64:		
S. E. of S. E. of 25	Oct., 1883	2 25
N. W. of S. W., S. W. N. W. of section 7	Oct., 1883	4 81
W. ½ S. W. ¼, section 19	Oct., 1883	4 32
Township 137, range 64:		
N. W. of N. W. of section 35	Oct., 1883	1 97
Township 144, range 63:		
All of section 1	Oct., 1883	28 37
All of section 3	Oct., 1883	28 37
All of section 5	Oct., 1883	28 37
All of section 7	Oct., 1883	28 37
All of section 15	Oct., 1883	28 37
38 All of section 19	Oct., 1883	28 37
All of section 23	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
All of section 35	Oct., 1883	28 37
Township 143, range 63:		
All of section 1	Oct., 1883	28 37
All of section 21	Oct., 1883	28 37
All of section 25	Oct., 1883	28 37
All of section 27	Oct., 1883	28 37
S. W. of N. E., W. ½ of N. W., E. ½ & S. W. of N. W., W. ½ S. E. ¼, section 35	Oct., 1883	14 29
All of section 3	Oct., 1883	28 37
All of section 5	Oct., 1883	28 37
All of section 9	Oct., 1883	28 37
All of section 11	Oct., 1883	28 37
All of section 13	Oct., 1883	28 37
All of section 15	Oct., 1883	28 37
All of section 17	Oct., 1883	28 37
All of section 7	Oct., 1883	28 37
All of section 29	Oct., 1883	28 37
All of section 19	Oct., 1883	28 37
Township 142, range 63:		
E. ½ of section 5	Oct., 1883	22 41
All of section 7	Oct., 1883	40 16

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
All of section 17	Oct., 1883	41 84
All of section 21	Oct., 1883	25 93
All of section 23	Oct., 1883	36 51
N. ½ & S. E. ¼, section 29	Oct., 1883	31 44
39 N. ½ N. W. & N. W. N. E.	Oct., 1883	7 77
W. ½ of section 25	Oct., 1883	19 58
E. ½ N. E. ¼, section 11	Oct., 1883	5 22
N. ½ N. W. ¼ & N. W. of N. E., sec. 9	Oct., 1883	7 80
S. ½ of S. E. of section 33	Oct., 1883	5 42
W. ½ & N. E. ¼, N. ½ S. E. ¼	Oct., 1883	36 57
Township 141, range 63:		
S. E. ¼ of section 22	Oct., 1883	1 78
N. E. ¼ and E. ½ of S. E. ¼, sec. 23	Oct., 1883	22 51
E. ½ & N. W. ¼ & N. W. of S. W. & S. E. of S. E. of section 1	Oct., 1883	41 75
All of section 5 except S. W. ¼	Oct., 1883	35 86
Township 139, range 63:		
S. W. ¼ & S. ½ S. E. ¼, sec. 11	Oct., 1883	17 81
S. W. of S. W. of section 9	Oct., 1883	3 14
S. W. of N. W. of section 10	Oct., 1883	3 14
N. E. ¼ S. ½ of S. W. ¼ of section 1	Oct., 1883	17 84
E. ½ & S. W. of N. E.	Oct., 1883	7 88
Township 137, range 63:		
N. W. of N. E. of section 15	Oct., 1883	2 94
S. E. ¼ of section 9	Oct., 1883	11 34
Township 142, range 62:		
All of section 5	Oct., 1883	41 15
All of section 9	Oct., 1883	41 84
All of section 17	Oct., 1883	41 84
All of section 21	Oct., 1883	41 84
40 N. E. ¼ E. ½ of N. W. of section 29	Oct., 1883	15 81
N. ½ of section 19	Oct., 1883	20 47
Township 141, range 62:		
S. W. ¼ & S. ½ N. W. ¼, section 9	Oct., 1883	17 82
E. ½, E. ½ of W. ½, sec. 1	Oct., 1883	53 89
All of section 5	Oct., 1883	47 05
N. E. ¼, section 25	Oct., 1883	12 00
N. W. ¼, section 27	Oct., 1883	12 31

Schedule B—Continued.

Description of land.	Date of sale.	Consideration.
E. ½ of S. E. ¼, section 31	Oct., 1883	6 14
E. ½ of N. E. ¼, section 23	Oct., 1883	6 14
Township 140, range 62:		
S. W. ¼, N. ½ of S. E. ¼ of section 3	Oct., 1883	22 51
Township 139, range 62:		
E. ½ of W. ½ of section 19	Oct., 1883	11 83
Township 137, range 62:		
W. ½ & N. ½ of N. E. ¼, section 23	Oct., 1883	21 86
		$478 59
Pages		2,572.33

(Indorsements:) Filed in the office of clerk district court for Stutsman county, Dakota Ter., October 30, 1886. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

41 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

I, A. McKechnie, sheriff of said county of Stutsman, do hereby certify that at Jamestown, in said county of Stutsman, on the 30th day of September, 1886, I then and there served the annexed summons and complaint in the within-entitled action upon D. C. Buck, one of the county commissioners of said Stutsman County, defendant, by giving to and leaving with him personally a true and attested copy of said summons and complaint and of each thereof.

Dated this 30th day of September, 1886.

A. McKECHNIE,
Sheriff of Stutsman County,
By T. H. BOWDITCH, *Deputy.*

Fees:

Service	60
5 copies	75
Mileage	20
	$1 55

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., Oct. 30, 1886. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

42 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs,
vs.
STUTSMAN COUNTY, Defendant.

Demurrer.

The defendant demurs upon the following grounds to the complaint of the plaintiff:

I.

That the plaintiff has not legal capacity to sue, the complaint failing to show his authority to sue as assignee of Daniel H. Wallace, or that Daniel H. Wallace did assign to him, or what was assigned.

II.

That there is a defect of parties plaintiff, for the reason assigned in paragraph one hereof, and the further reason that the complaint does not allege what interest either of said plaintiffs have in the alleged cause of action set up in the complaint. There is a defect of the party defendant, in this, that there is no such corporation as "Stutsman County."

III.

That several causes of action have been improperly united in the complaint.

43 IV.

That the complaint does not state facts sufficient to constitute a cause of action.

S. L. GLASPELL,
Attorney for Defendant.

Due service admitted 10, 20, 1886.

DODGE & CAMP,
Att'ys for Pl'ffs.

(Indorsements:) Service by copy admitted at Jamestown 10, 20, '86. Dodge & Camp. Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., Oct. 28, 1886. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

44 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Pl'ffs,

vs.

STUTSMAN COUNTY, Defendant.

Order.

The plaintiffs having appeared, by their attorneys, Messrs. Dodge and Camp and John S. Watson, and the defendant, by its attorney, Roderick Rose, before the court at Bismarck on this 13th day of April, 1887, and stipulated that the demurrer theretofore filed by the defendant's counsel to the complaint of the plaintiffs should be withdrawn and the defendant allowed to file and serve his answer to said complaint, it is hereby ordered that said demurrer be, and the same is hereby, withdrawn and the defendants allowed to answer said complaint without delay.

Dated at Bismarck this 13th day of April, A. D. 1887.

WILLIAM H. FRANCIS, *Judge.*

In the case above entitled issue having been joined by the service and filing of an answer to the plaintiffs' complaint and the agreement contained in the thirteenth paragraph of the stipulation, and counsel having for the respective parties stipulated all of the facts in said case bearing upon the issues raised by said pleadings, which stipulation has been filed, and the defendant's counsel now having moved the court for judgment upon the ground that plaintiffs' com-
45 plaint does not state facts sufficient to constitute a cause of action against defendant to enable them to recover what they claim or seek to claim even if all the facts pleaded therein were true. Second, because the evidence in the case is wholly insufficient to support and establish the necessary allegations and facts to enable them to maintain their claim and recover what they seek to recover in this action, and to enable the court to give them judgment therefor.

Said motion is hereby denied; to which order of the court denying the same the defendant's counsel at the proper time excepts, and said exception is hereby made a matter of record in the case.

Dated at Bismarck, D. T., April 13th, A. D. 1887.

WILLIAM H. FRANCIS, *Judge.*

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

46 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

District Court, Sixth Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of David H. Wallace, Plaintiffs,
vs.
STUTSMAN COUNTY, Defendant. } Answer.

The defendant, in answer to plaintiffs' complaint, denied each and every allegation contained therein.

RODERICK ROSE,
Attorney for Defendant.

(Indorsed:) Due and sufficient service of the within answer is admitted this April 13, 1887. Dodge & Camp, John S. Watson, pl'ffs' att'ys. Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

47 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs,
vs.
STUTSMAN COUNTY, Defendant.

Stipulation of Facts.

It is stipulated by and between the parties to the above-entitled action that the following is a true and correct statement of the facts in said action upon which plaintiffs base their claim to recover therein, to wit:

I.

That the Northern Pacific Railroad Company is a corporation duly organized and existing under that certain act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line running from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and under those certain subsequent acts and resolutions of Congress relating to the same subject-matter, each of which acts is hereby made a part hereof.

II.

That the lands described in Schedules A & B, annexed to the complaint herein and made a part thereof, and each and every parcel of said lands were embraced in the provisions of said act and
48 were by terms and provisions thereof granted to the said Northern Pacific Railroad Company under said terms and provisions.

III.

That under and in pursuance of said several acts and resolutions of Congress said Northern Pacific Railroad Company had, prior to the year 1880, completed and caused to be completed and put in operation a continuous line of railroad and telegraph extending from the waters of Lake Superior, at Duluth, Minnesota, westwardly across said State and across the Territory of Dakota to and beyond the westerly limit of said Territory, and of the character and material specified in said act, and everything had been done by said railroad company to acquire a complete and perfect title to the lands in controversy in this action and described in said schedules, except as to the payment of the costs of survey, and so forth, required in the act of Congress of July 15, 1870, all of which part of the railroad located within said Territory had been located and completed since said July 15, 1870. The Government of the United States, since the passage of said act of July 15, 1870, has caused said lands to be surveyed at its own expense, no part of which expense or costs of surveying was repaid to it by the said railroad company or by any one in its behalf or by any party in interest, prior to March 16, 1886. The patent for said lands or any of them had not on the first day of January, 1884, been issued to said railroad company or to any person for said company, and the Government of the United States refused to issue said patents until the payment for sur-
49 veying and selecting said lands, as above mentioned, and required by said act of July 15, 1870, and said act is made a part hereof.

IV.

That the said lands were, at the time said acts were passed and the said railroad located through said Territory of Dakota, a part of the public domain of the United States and not any part of the right of way mentioned in said acts, and had never been sold, reserved, granted, or otherwise appropriated, except as above mentioned, and were free of pre-emption and other rights, and were situated within a distance of forty miles of the line of the railroad of the Northern Pacific Railroad Company aforesaid.

V.

That in the year 1880 the officers of the said county of Stutsman authorized by the laws of this Territory to assess property therein for the purpose of taxation and to levy thereon assessed and levied taxes upon all the lands described in said Schedule A and each

and every parcel thereof for the year 1880 for the following purposes: Territorial tax, county tax, general school tax, and district school tax, all of which remained unpaid on the first day of October, 1882; that prior to said first day of October, 1882, Thomas S. Collins, who was then the county treasurer of said county, did advertise and give public notice that on a certain day and at a certain place, to wit, on the first Monday of October, 1882, at the office of said treasurer, in the village of Jamestown, in said county, he would sell said lands, as pursuant to law, for the non-payment of said taxes and for
50 the collection of the same; that on said first Monday of October, 1882, at said office, said Collins, as county treasurer of said county, offered said lands and each and every parcel thereof separately to the highest bidder for the said taxes and for the collection of the same, and the said lands and each separate parcel thereof were then and there at said sale publicly struck off and sold to said Charles S. Wallace, he being the highest bidder therefor, for the sums, respectively, hereinafter mentioned, set opposite to each respective description of said lands in said Schedule A and amounting in the aggregate to five thousand two hundred twenty-one and seventy-five hundredths dollars; that said Collins, as such treasurer, did then and there execute and deliver to said Charles S. Wallace certificates of sale of said lands in form provided by law to be issued upon the sale of lands for non-payment of taxes, and said Wallace did then and there pay the said Collins, as treasurer of said county, each and all the sums in said Schedule A mentioned as the purchase price of said parcels of land, respectively, which said sums amounted in the aggregate to the sum of five thousand two hundred twenty-one and seventy-five hundredths dollars.

VI.

That in the year 1881 the officers of said county authorized by the laws of this Territory to assess property therein assessed and levied taxes upon all the parcels of land described in said Schedule A for that year for the following purposes: Territorial tax, county, general school tax, and district school tax; that said plaintiff, Charles S. Wallace, in order to protect his tax lien thereon and equi-
51 table title thereto, paid to the defendant's treasurer as subsequent taxes upon said land, being the taxes so levied for the year 1881, and upon each and every parcel thereof, to wit, on the first Monday in October, 1882, the sum of money designated by the figures set opposite the description of said lands in said Schedule A in the column of figures under the words "subsequent tax paid," amounting in the aggregate to four thousand six hundred ninety-nine and twenty-five hundredths dollars, none of which taxes so levied for the year 1881 had theretofore been paid.

VII.

That in the year 1882 the officers of said county authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes thereon assessed levied taxes for the

following purposes: Territorial tax, county tax, general school tax, and district school tax, upon all the parcels of land described in said Schedule B and each parcel thereof, for the year 1882, all of which remained unpaid on October first, 1883; that prior to said first day of October, 1883, William E. Mansfield, who was then the treasurer of said county, offered said lands and each separate parcel thereof for sale at public auction to the highest bidder for the non-payment of the said taxes and for the collection of the same, and the said lands described in Schedule B and each separate parcel thereof were then and there at said sale publicly struck of and sold to the plaintiff Wallace, he being the highest bidder therefor, for the sums respectively mentioned, set opposite to each respective description of said lands in said Exhibit B; that said William E. Mansfield, as such treasurer, did then and there execute and deliver to the plaintiff Wallace certificates of sale of said lands in form as provided by law to be issued upon sale of lands for the non-payment of taxes, and the plaintiff Wallace did then and there pay the said Mansfield, as such treasurer, each and all the sums in said Schedule B mentioned as the purchase price of said parcels of land, respectively, which sums amounted in the aggregate to the sum of six thousand and thirty-three dollars.

52

VIII.

That in the month of October, 1884, an action was brought in the district court in and for said county of Stutsman, wherein said Northern Pacific Railroad Company was plaintiff and William E. Mansfield, as such treasurer, and Charles S. Wallace were defendants, the object whereof, as stated in the complaint, was to obtain a decree that said defendant treasurer and his deputy and deputies and successor and successors be forever enjoined and restrained from executing to any person, natural or corporate, any tax deed or deeds covering or conveying or purporting to convey any of the parcels of land described in said Schedule A, based upon or growing out of the sale of said lands to said plaintiff Wallace, set forth in paragraph five of this statement, or to enforce the payment of the taxes mentioned in said paragraph; that thereafter such proceedings were had that on the sixth day of August, 1886, said court made and entered its final decree in said action as follows:

Final Decree.

This cause having come up to be heard at chambers, on the sixth day of August, 1886, upon the motion of the plaintiff upon the pleadings for the recovery of judgment as prayed in the complaint, and the said motion for consideration of the court having been granted and judgment ordered accordingly, now, therefore, it is hereby ordered, adjudged, and decreed that the tax proceedings referred to in the complaint in said action be, and the same are hereby, adjudged to be null and void, and that the said defendant and each and all of them be, and they hereby are, forever

53

restrained and enjoined from in any manner setting up or claiming title to any of the premises in the complaint described under or through or by means of the said tax proceedings or any of them, and the said defendant in said action, the county treasurer in and for said county, and his deputy and deputies and his successor and successors in office be, and each of them hereby is, forever restrained and enjoined from executing to any or all of the other defendants or his or their assigns or any other person, natural or corporate, any tax deed or deeds covering or conveying or purporting to cover or convey any of the parcels of land described in the said complaint and in the schedule thereto annexed based upon or growing out of any sale or sales of the said parcels of land or of any of them, made in whole or in part to enforce the payment of any of the taxes in the said complaint mentioned; and the said remaining defendant and each of them and their assigns are hereby forever further restrained and enjoined from soliciting or receiving any such tax deed or deeds; and it is hereby further adjudged and decreed that
54 the plaintiff recover from the defendants his costs and disbursements in said action, to be taxed by the clerk.

WILLIAM H. FRANCIS, *Judge.*

IX.

That in the month of September, 1885, an action was brought in the district court in and for said county, wherein said railroad company was plaintiff and George L. Webster, as such treasurer, and Charles S. Wallace were defendants, the object whereof, as stated in the complaint, was to obtain a decree that said defendant treasurer and his deputy and deputies and successor and successors be forever enjoined and restrained from executing to any person, natural or corporate, any tax deed or deeds covering or conveying or purporting to cover or convey any of the parcels of land mentioned in said Schedule B, based upon or growing out of the sale of said lands to said plaintiff, Charles S. Wallace, set forth in paragraph seven of this statement, or to enforce payment of the taxes in said paragraph mentioned; that thereafter such proceedings were had that on the 17th day of September, 1886, said court made and entered its final decree in said action as follows:

Final Decree.

This cause having come on to be heard at chambers, on the — day of September, 1886, upon the motion of the plaintiff on the pleadings and the report of the referee on file herein for the recovery of judgment, as prayed in the complaint, and the said motion, upon consideration of the court having been granted and judgment ordered accordingly, now, therefore, it is hereby ordered, adjudged, and decreed that the tax proceedings referred to in the complaint
55 in said action be, and the same are hereby, adjudged to be null and void, and that the said defendants and each and all of them be, and they hereby are, forever restrained and enjoined from

in any manner setting up or claiming title to any of the premises in the complaint described under or through or by means of the said tax proceedings or any of them, and the said defendant in said action, the said county treasurer of said county, and his deputy and deputies and successor and successors in said office be, and each and every of them hereby is, forever restrained and enjoined from executing to any or all of the other defendants or his or their assigns or any other person or persons, natural or corporate, any tax deed or deeds covering or conveying or purporting to cover or convey any of the parcels of land described in the said complaint and in the schedule thereto annexed, based upon or growing out of any sale or sales of the said parcels of land or any of them, made in whole or in part to enforce the payment of any of the taxes in the complaint mentioned; and the said remaining defendants and each of them and their assigns are hereby further forever restrained and enjoined from soliciting or receiving any such tax deed or deeds; and it is further hereby adjudged and decreed that the plaintiff recover from the defendants its costs and disbursements in said action, to be taxed by the clerk.

Done at Bismarck, Dakota, September 17th, 1886. By the court:
WILLIAM H. FRANCIS, *Judge.*

56 X.

That in the year A. D. 1886, and prior to the commencement of this action, said plaintiff, Charles S. Wallace, for a valuable consideration, sold, assigned, and set over unto said plaintiff, James M. Martin, as assignee for said Daniel H. Wallace, said certificates and each and every one of them, and said moneys so paid to said defendant by the plaintiff, Charles S. Wallace, for the purchase of said lands at said tax sales and for the payment of said subsequent taxes in trust for the payment of certain debts of the said Charles S. Wallace and of one R. E. Wallace, and the surplus, if any, to be returned to the said Charles S. Wallace, and that the plaintiffs now are the holders and owners of each and every of said certificates.

XI.

That prior to the commencement of this action, in the month of September, 1886, the plaintiff tendered to said county and to the board of county commissioners thereof, at a duly appointed meeting of said board, the said tax certificates hereinbefore mentioned and all of them, and offered to surrender said certificates to said county upon the payment of the amount so paid by said plaintiff, Charles S. Wallace, for the purchase of said lands at said sales and for the payment of the subsequent taxes thereon as aforesaid, together with the interest thereon at the rate of thirty per cent. per annum from the dates of such payment; that defendant then and there refused and ever since has and does still refuse to pay to the plaintiff such sum or any part thereof, and that the whole thereof is still unpaid.

57 XII.

That no part of said land has ever been redeemed from said sales nor from either of them, nor from said subsequent taxes so paid as aforesaid.

XIII.

And it is hereby expressly stipulated by and between the respective parties to this action that the defendant, under his answer of general denial shall have the benefit of all defences of every kind and nature as fully and completely as though they had been specifically pleaded in his answer.

Dated April 13, A. D. 1887.

RODERICK ROSE,
Attorney for Defendant.
DODGE & CAMP AND
JOHN S. WATSON,
Att'ys for Plaintiffs.

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme Court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

58 TERRITORY OF DAKOTA, } *ss:*
County of Stutsman, }

In the District Court, Sixth Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiff,

vs.

STUTSMAN COUNTY, D'f't.

Motion for Judgment.

Now comes the defendant, by its attorney, Roderick Rose, and moves the court for judgment against the plaintiffs for its costs and disbursements in this action for the following reasons, to wit:

1st. Because the complaint of plaintiffs does not state facts sufficient to constitute a cause of action against defendant to enable them to recover what they claim or seek to claim, even if all the facts pleaded therein were true.

2nd. Because the evidence in the case is wholly insufficient to support and establish the necessary allegations and facts to enable them to maintain their claim and recover what they seek to recover in this action, and to enable the court to give them judgment therefor.

RODERICK ROSE,
Attorney for Defendant.

(Indorsed:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

59 TERRITORY OF DAKOTA, *County of Stutsman:*

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignees of Daniel H. Wallace, Pl'ffs, *vs.* STUTSMAN COUNTY, Defendant. } Decision of the Court.

Findings of Fact.

All the facts in this case having been stipulated by counsel, and the written stipulation thereof having been filed with the clerk as containing a correct statement of the facts in said case, said statement of facts is hereby adopted as the findings of fact by the court, and the court now finds the following conclusions of law as applicable to this case:

Conclusions of Law.

That the lands described in the plaintiffs' complaint and each and every parcel thereof were at the time of the sale thereof mentioned and described in said stipulated statement by the treasurer of said Stutsman county for delinquent taxes lands upon which no tax was due, and that no tax of any description was due upon any portion of said lands at the time of the sales mentioned therein or either of them or at any of the times mentioned in said complaint.

Second.

60 That said lands and each and every parcel thereof was sold, as set forth in said statement of facts, by the mistake and wrongful act of the defendant's treasurer, the then county treasurer of Stutsman county, and that the plaintiffs are entitled to recover from the defendant the amount paid for said lands at said sales and the amount paid as subsequent taxes thereon, as hereinafter stated, together with thirty per cent. interest thereon and on the whole amount so paid from and after the date of such payments, as hereinafter specified, to this date.

I therefore order judgment in favor of the plaintiffs and against said Stutsman County, defendant, for the amount of nine thousand nine hundred twenty-one dollars, with interest thereon from and after the 1st day of October, 1882, at the rate of thirty per cent. per annum, and for the amount of six thousand thirty-three dollars, with interest thereon from and after the 1st day of October, 1883, at the rate of thirty per cent. per annum, amounting in the aggregate, both principal and interest, to the sum of thirty-five thousand eight

hundred dollars, together with the costs and disbursements of this action.

Dated at Bismarck, D. T., April 13th, A. D. 1887.

WILLIAM H. FRANCIS, *Judge.*

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

61 TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Pl'ffs, }
vs. } Judgment.
STUTSMAN COUNTY, Defendant. }

In the district court in and for said county, in and for the 6th judicial district of the Territory of Dakota, on the 13th day of April, A. D. 1887, the Hon. William H. Francis, judge, presiding, the following proceedings were had: This case having been duly tried and submitted to this court upon a written stipulation of facts and upon argument of counsel, Messrs. Dodge & Camp and John S. Watson appearing for the plaintiff and Roderick Rose, Esq., district attorney, appearing for defendant, and the court having heretofore rendered its decision in writing, after due consideration, it is ordered and adjudged that the plaintiffs have and recover of and from the defendant herein the sum of thirty-five thousand eight hundred dollars, together with costs and disbursements in this action, to be taxed according to law by the clerk of this court, amounting to twenty and fifteen-hundredths dollars, amounting in the whole to the sum of thirty-five thousand eight hundred and twenty and fifteen-hundredths dollars.

Dated at Bismarck, D. T., April 13th, A. D. 1887.

WILLIAM H. FRANCIS, *Judge.*

62 (Indorsements:) Due and sufficient service of the within and foregoing judgment and findings and conclusions of law, by copy, served personally, is admitted this 13th day of April, A. D. 1887. Roderick Rose, att'y for def't. Filed in the office of clerk of dist. court for Stutsman county, Dakota Ter., April 13, 1887, at 5 o'clock p. m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. C. H. Young, clerk.

63 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Pl'ffs, *vs.* STUTSMAN COUNTY, Defendant. } Exceptions to Orders and Decision of the Court.

Now comes the defendant, by its counsel, and excepts to the order of the court denying defendant's motion for judgment for the following reasons: First. Because the allegations in plaintiff's complaint do not state facts sufficient to constitute a cause of action against defendant. Second. Because it is not alleged in said complaint that the whole or any part of the moneys paid by plaintiffs to defendant was used by the defendant for the use of its tax-payers. Third. Because there is no evidence in the case showing that defendant ever had any use of the moneys paid by plaintiffs to defendant, reference being made to entire agreed statement of facts. The defendant also excepts to the findings and conclusions of law by the court for the following reasons:

First. Because the evidence is insufficient to warrant the conclusion that no taxes were due at the time of the sales by the defendant's county treasurer upon the lands or any part thereof described in plaintiff's complaint; but, on the contrary, the evidence shows that the taxes were due and were properly a lien on said land, reference being made to entire agreed statement of facts.

Second. Because the evidence is insufficient to warrant the
64 conclusion that said lands and every part thereof was sold by the mistake and wrongful act of the defendant's treasurer, the county treasurer of Stutsman county, and that the plaintiffs are entitled to recover from the defendant the amount paid for said lands and the amount paid for subsequent taxes thereon, together with 30 per cent. interest thereon, on the whole amount so paid, from and after the date of such payments to this date, reference being made to entire agreed statement of facts.

The defendant further excepts to the order of the court denying defendant's motion for a new trial of this cause.

Dated at Bismarck, D. T., April 13th, A. D., 1887.

RODERICK ROSE,
Att'y for Defendant.

The foregoing exceptions to the orders and decisions of the court in the above-entitled action are severally examined and allowed, and the same are ordered to be annexed to and incorporated with the statement of the case.

Bismarck, D. T., April 13th, A. D., 1887.

WILLIAM H. FRANCIS, *Judge.*

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. C. H. Young, clerk.

65 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, 6th Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Pl'ffs,
vs.
STUTSMAN COUNTY, Defendant.

Motion for New Trial.

Now comes the defendant, by its counsel, and moves the court to set aside the decision rendered in this case and for a trial upon the following grounds:

First.

Because the evidence is insufficient to warrant the conclusion that there were no taxes due upon the lands or any part thereof described in plaintiffs' complaint at the time they were sold by defendant's treasurer to plaintiffs.

Second.

That the evidence is insufficient to warrant the conclusion of law that the said lands were sold by the mistake and wrongful act of defendant's treasurer, and that the plaintiffs are entitled to recover the amount paid for said lands and subsequent taxes thereon, with 30 per cent. interest thereon from the date of such payments to this date.

Third.

That the decision is against law.

The said motion is based on the pleadings, the statement of the case, and all the records made therein; together with all
66 the orders of the court or the judge thereof made herein.

Dated at Bismarck, D. T., April 13th, A. D. 1887.

RODERICK ROSE,
Attorney for Defendant.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

The court having heard the defendant's motion for setting aside the decision made herein and for a new trial, and being fully advised in the matter, overrules the motion and denies a new trial.

Done at Bismarck April 13, 1887.

WILLIAM H. FRANCIS,
Judge Dist. C't.

Due and sufficient service of the within motion for a new trial is admitted this April 13th, 1887.

DODGE & CAMP AND
JOHN S. WATSON,
Pl'ffs' Att'ys.

(Indorsements:) Filed in the office of clerk dist. court for Stutsman county, Dakota Ter., April 13, 1887, at — o'clock — m. Chas. T. Hills, clerk. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

67 TERRITORY OF DAKOTA, } *ss:*
County of Stutsman, }

In District Court, Sixth Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs,

vs.

STUTSMAN COUNTY, Defendant.

Certificate.

I, William H. Francis, judge of the district court in and for the 6th judicial district of the Territory of Dakota, do hereby certify that the foregoing papers hereunto attached, to wit, the summons, complaint, demurrer, order withdrawing same, answer, stipulation of facts, defendant's motion for judgment, decision of the court, including findings of fact and conclusions of law, judgment, defendant's motion for new trial and order overruling same, and bill of exceptions, constitute and comprise the judgment-roll in the above-entitled action, to be considered in connection with all proceedings on appeal to the supreme court therein, and that said papers constitute the entire judgment-roll therein.

Dated at Bismarck, D. T., April 13th, A. D. 1887.

WILLIAM H. FRANCIS, *Judge.*

(Indorsements:) Filed in my office April 13th, A. D. 1887. Witness my hand and the seal of said court. Chas. T. Hills, clerk dist. court, Stutsman county, Dakota. Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

68 TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

In District Court, Sixth Judicial District.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs,
vs.
STUTSMAN COUNTY, Defendant.

Certificate of Clerk of Court.

TERRITORY OF DAKOTA, } ss:
County of Stutsman, }

I, Chas. T. Hills, clerk of the district court within and for the said county of Stutsman, in the sixth judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof, of the judgment-roll, and of the certificate of the judge in the above-entitled action, wherein Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, are plaintiffs and Stutsman County is defendant, as the same now remain of record in the said court.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court this nineteenth day of April, A. D. 1887.

CHAS. T. HILLS, *Clerk.*

(Indorsement:) Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

69 *Assignment of Errors.*

I.

The court erred in deciding that the lands mentioned and described in Schedules "A" and "B" and annexed to plaintiffs' complaint were not subject to and liable for the taxes therein described, and that there were no taxes due thereon when sold.

II.

The court erred in deciding that the lands were sold by the mistake and wrongful act of the treasurer of Stutsman county.

III.

The court erred in deciding that plaintiffs were entitled to recover from defendant the amount paid for said lands at said sales and the amount paid as subsequent taxes thereon, together with 30 per cent. interest thereon, and on the whole amount from and after the date of such payments to this date (April 13, 1887).

IV.

The court erred in overruling defendant's motion for judgment against plaintiffs, said motion being based upon the grounds specified therein.

V.

The court erred in overruling defendant's motion for a new trial, said motion being based upon the grounds specified therein.

RODERICK ROSE,
Att'y for Defendant.

70 The clerk will please append this assignment of errors to the transcript of judgment-roll on appeal in case of Wallace *et al. vs.* Stutsman County.

RODERICK ROSE,
Att'y for Appl't.

To Chas. T. Hills.

(Indorsement:) Supreme court of the Territory of Dakota. Filed April 23, 1887. J. H. C. Young, clerk.

71 THE UNITED STATES OF AMERICA; *Territory of Dakota,* } *ss:*

In the Supreme Court.

Appeal from the district court of Stutsman county.

CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents, *vs.* STUTSMAN COUNTY, DAKOTA TERRITORY, Defendant and Appellant.	May Term, A. D. 1887.

This action coming on to be heard at the May, A. D. 1887, term of this court, at the supreme court rooms, in the city of Yankton, D. T.—

Present: Bartlett Tripp, chief justice, and Cornelius S. Palmer, William H. Francis, William B. McConnell, Charles M. Thomas, and James Spencer, associate justices—and the appeal herein having been argued by Roderick Rose for the appellant and by W. E. Dodge and John S. Watson for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Stutsman county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

72 And it is further considered and adjudged that plaintiffs and respondents have and recover of the defendant and appellant costs and disbursements on this appeal expended, taxed and allowed at seventy-eight and ninety-five hundredths dollars.

By the court:

BARTLETT TRIPP,
Chief Justice Supreme Court D. T.

All the justices concurring.

(Indorsement:) Filed in open court this 26th day of May, 1887. J. H. C. Young, clerk.

73 TERRITORY OF DAKOTA:

Supreme Court.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs and Respondents,
against
STUTSMAN COUNTY, Defendant and Appellant.

It is hereby stipulated and agreed by and between the attorneys for the above-named plaintiffs and defendant in the action above entitled that the clerk of the said court may, without further notice, on motion of the attorneys for the respondents, tax the costs in said action in said supreme court upon the appeal from the judgment of the district court in and for Stutsman county, rendered on the 13th day of April, 1887, which judgment was at the May term, in 1887, of said supreme court affirmed, in the sum of seventy-eight and ninety-five hundredths dollars ($78.95).

Dated at Jamestown, D. T., June fourth, 1887.

DODGE & CAMP AND
JOHN S. WATSON,
Att'ys for Respondents.
RODERICK ROSE,
Att'y for Appellants.

Brief	$35 00
Clerk's fees	13 95
Before argument	5 00
Argument	25 00
	78 95

74 And now come the respondents, by their attorneys, Dodge & Camp and John S. Watson, and move the court and the clerk thereof that costs in the above-entitled matter be taxed against the appellant in the sum of seventy-eight and ninety-five hundredths dollars.

Dated June 16, 1887.

DODGE & CAMP.
JOHN S. WATSON.

The above bill of costs and disbursements taxed and allowed at $78.95.

J. H. C. YOUNG, *Clerk.*

Yankton, D. T., June 22, 1887.

75 In the Supreme Court of the Territory of Dakota. February Term, 1888.

CHARLES S. WALLACE & JAMES M. MARTIN, as Assignees of Daniel H. Wallace, Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

The said Stutsman County, defendant and appellant, comes now and respectfully petitions this honorable court for a rehearing of said cause for the following reasons, to wit:

1st. Because this honorable court, upon the argument and hearing of the appeal from the judgment entered in favor of plaintiffs and against the defendant herein, held, decided, and determined that the lands and premises mentioned and described in the complaint in said action and referred to in the abstract on the appeal in said cause, and each and every part and parcel thereof, were sold by the mistake and wrongful act of the treasurer of said defendant, whereas it was conceded by and on the part of the plaintiffs, as will fully appear from an examination of the record in said cause, that all said lands were sold by said treasurer in strict conformity to the requirements of the laws of the Territory of Dakota in such

76 cases made and provided, and that in the making of said sales the said defendant, through its said treasurer, fully complied with all and singular the conditions and requirements of the law applicable or having reference to the subject-matter and with all enactments and laws prescribed for his guidance in the collection of taxes; and, further, that said treasurer, in making said sales, as fully appears from an examination of the complaint in said action, acted in good faith.

2nd. Because that inasmuch as the said treasurer, as is conceded by plaintiff, acted in good faith and in conformity to the requirements of the law in making said sales, and being a ministerial officer (as, of course, will be conceded), he was fully protected and justified in the making of said sales by the duplicate tax-list delivered to him by the county commissioners of said county of Stutsman.

3rd. Because, conceding that the propositions and statements above made are warranted, this honorable court affirmed the judgment in this cause upon the ground that the said treasurer in selling said lands did so "by mistake and wrongfully," and in so affirming said judgment this court manifestly failed to examine and consider the provisions of section 40 of chapter 28 of the Political Code, which said section, among other things, provides "the commissioners shall attach to the list their warrant, and under their hand and official seal in general terms require the treasurer to collect the

taxes therein levied, and the county clerk shall take the receipt of the county treasurer on delivering to him the duplicate tax-
77 list, with the warrant of the county commissioners attached, and such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained.

4th. Because in offering said judgment this court allowed to said plaintiff interest at the rate of thirty per cent. per annum upon the amount sought to be recovered by them in this action, whereas the right to recover interest at said rate per annum is only accorded to such persons as shall or may lawfully redeem lands sold for taxes; and inasmuch as it is not claimed or pretended that this action was brought by or in the interest of a redemptioner, it is manifest that this court, in offering said judgment, failed to examine or consider the provisions of the law of this Territory which fixes and establishes the rate of interest for the loan or forbearance of money at the rate of seven per cent.

5th. Because, as appears from the record in this cause, this court, in the affirmance of the said judgment, allowed and permitted a recovery by the plaintiffs, for moneys voluntarily paid by them to said treasurer for taxes levied and assessed upon the lands in question subsequently to the date of said sales, which said voluntary payments were made within the period that said lands might have been redeemed by the owners thereof, and this court, in allowing the plaintiffs to recover for said voluntary payments, failed to consider these matters, namely:

A. That the plaintiffs when they purchased the — thereby acquired no lien thereon.

B. That such payments were purely voluntary.

78 C. That said treasurer, in receiving the same, was not thereunto authorized by any law.

D. That the receipt by said treasurer of said moneys for subsequent taxes being unauthorized by law, the said county was not thereby bound to return or account for the same.

E. That the plaintiffs could only recover the moneys so paid in an action against said treasurer personally.

That no judgment has been entered in this action in the district court upon the remittitur from this court.

Wherefore appellant prays for an order granting a rehearing of the appeal at such future time as may please the court, and that the remittitur of the judgment of this court to the district court be recalled.

Dated February 6th, 1888.

RODERICK ROSE,
Att'y for Appellant.

(Indorsement:) Supreme court of the Territory of Dakota. Filed Feb'y 6, 1888. J. H. C. Young, clerk.

In Supreme Court, Territory of Dakota.

79 CHARLES S. WALLACE *et al. vs.* STUTSMAN COUNTY.

In the matter of the petition of the defendant for an order granting a rehearing in the above-entitled action the plaintiffs, appearing specially by their attorneys, Dodge & Camp and John S. Watson, move to strike out said petition for a rehearing on the following grounds:

First. Because said petition was not filed or any motion made for a rehearing at the term at which judgment was rendered.

The judgment was rendered May 26th, 1887, and the petition was filed February 6th, 1888. The May term of this court must have expired not later than the date of the beginning of the October term of 1887. Under the rules of this court and the decision in Roberts *vs.* Haggart (Dakota, 29th N. W. Rep., 656) this court has lost jurisdiction of the case.

Second. Because section 25, chapter 20, Laws of 1887, limits the time within which a petition for a rehearing can be filed to sixty days after the rendition of the judgment. This limit of time expired July the 26th, 1887. The above-named section of the Session Laws of 1887 is an exact copy of chapter 264, Laws of 1860, Wisconsin, which is construed in Pringle *vs.* Dunn, 39 Wisconsin, 435–441, to which particular attention is invited. Please see also first

80 five pages of our brief in the case of The Territory of Dakota *ex rel.* Charles S. Wallace *et al. vs.* George H. Woodbury *et. al.*, being calendar No. 58 of this, February, 1888, term of said court.

February 7, 1888.

DODGE & CAMP AND
JOHN S. WATSON,
Pl'ffs' Att'ys.

(Indorsement:) Supreme court of the Territory of Dakota. Filed February 7, 1888. J. H. C. Young, clerk.

81 THE UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota,

In the Supreme Court.

Appeal from the district court of Stutsman county.

CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents, } February Term, A. D. 1888.

vs.

STUTSMAN COUNTY, Defendant and Appellant.

This action coming on to be heard at the February, A. D. 1888, term of this court, at the supreme court room, in the city of Bismarck, D. T.—present, Bartlett Tripp, chief justice, and Cornelius S.

Palmer, William H. Francis, William B. McConnell, Charles M. Thomas, and James Spencer, associate justices—and appellants' petition for a rehearing in the matter of the judgment rendered by this court at its May, 1887, term, having been argued by Roderick Rose, for the appellant, and by W. E. Dodge and John S. Watson, for respondents, and the court having advised thereon, it is now here considered, ordered, and adjudged that the petition of appellant for a rehearing herein be, and the same is hereby, denied.

And it is further considered and adjudged that —— —— have and recover of the — costs and disbursements on this appeal expended, taxed and allowed at —.

82 By the court:

BARTLETT TRIPP,
Chief Justice of Supreme Court, D. T.

(Indorsement:) Filed in open court this 24th day of February, 1888. J. H. C. Young, clerk.

83 In the Supreme Court of the Territory of Dakota.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Plaintiffs and Respondents,
vs.
STUTSMAN COUNTY, Defendant and Appellant. } Petition for Appeal.

To the honorable the judges of said supreme court of Dakota Territory:

The above-named appellant and defendant, conceiving itself aggrieved by the final judgment entered on the 26th day of May, 1887, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and it prays that its appeal may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

RODERICK ROSE,
Attorney for Defendant & Appellant.

The appeal prayed for in the foregoing petition is hereby allowed. Dated February 24th, 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Indorsement:) Supreme court of the Territory of Dakota. Filed Feb'y 24, 1888. J. H. C. Young, clerk.

84 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court.

Cause.

CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

Filed April 23, 1888.

Journal Entries.

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court. May Term, 1887.

Tuesday, May 10, 1887, being the first day of the term.

* * * * * * *

On Call of Calendar.

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignees of Daniel H. Wallace, Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

Cause called. Counsel answers ready for argument.

85 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court. May Term, 1887.

Saturday, May 14, 1887, being fifth day of the term.

* * * * * * *

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

Argued.

Roderick Rose, for appellant; W. E. Dodge and John S. Watson, *contra.*

Submitted to the court.

86 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court. May Term, 1887.

Thursday, May 26, 1887, being the fifteenth day of the term.

* * * * * * *

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents,
vs.
STUTSMAN COUNTY, Defendant and Appellant.

Judgment of the district court within and for Stutsman county in all things affirmed.

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court. May Term, 1887.

Monday, February 6, 1888, being the seventeenth day of the term.

* * * * * * *

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignees of Daniel H. Wallace, Plaintiffs and Respondents,
vs.
STUTSMAN COUNTY, Defendant and Appellant.

87 *Petition for Rehearing is Presented to the Court.*

* * * * * * *

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court. February Term, 1888.

February 17, 1888, being the tenth day of the term.

* * * * * * *

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignees of Daniel H. Wallace, Plaintiffs and Respondents,
vs.
STUTSMAN COUNTY, Defendant and Appellant.

Motion to strike out petition for rehearing argued by W. E. Dodge, Esq., and John S. Watson, Esq., for motion, and Roderick Rose, Esq., *contra.*

Petition for rehearing argued by Roderick Rose, Esq., for petition, J. S. Watson, Esq., and W. E. Dodge, Esq., *contra.*

Submitted to the court.

88 UNITED STATES OF AMERICA, *Territory of Dakota*, } ss:

In Supreme Court. February Term, 1888.

February 24, 1888, being the sixteenth day of the term.

* * * * * * *

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignees of Daniel H. Wallace, Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

Petition for rehearing denied.

In CHARLES S. WALLACE and JAMES M. MARTIN, Assignees of Daniel H. Wallace, Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY, Defendant and Appellant.

Roderick Rose, Esq., attorney for appellant, prays that an appeal may be allowed to the Supreme Court of the United States, and the appeal is allowed.

89 Know all men by these presents that William M. Lloyd, Jr., and James M. Lloyd, of the city of Jamestown, in Stutsman county, in the Territory of Dakota, are held and firmly bound unto Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, in the full sum of five hundred dollars, to be paid to the said Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of March, A. D. 1888.

Whereas at a session of the supreme court of the Territory of Dakota, in a suit depending in said court between the said Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, and Stutsman County, a final judgment was rendered against the said Stutsman County for the sum of $35,820.15, damages, and $78.95, costs, and the said Stutsman County having obtained the allowance of an appeal from said judgment and filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday in October next:

Now, the condition of the above obligation is such that if the said

Stutsman County shall prosecute said appeal to effect and answer all costs if said county fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM M. LLOYD AND
JAMES M. LLOYD.

Sealed and delivered in the presence of—
RODERICK ROSE,
Of Jamestown, D. T.

UNITED STATES OF AMERICA,
Territory of Dakota, County of Stutsman, } *ss:*

William M. Lloyd, J., and James M. Lloyd, being each duly sworn, depose and say and each for himself says that he is a householder and freeholder in the county of Stutsman and Territory of Dakota, and that he is worth the sum of five thousand dollars over and above all his just debts and liabilities and exemptions allowed by the laws of the Territory of Dakota.

WILLIAM M. LLOYD, J.
JAMES M. LLOYD.

Subscribed in my presence and sworn to before me by William M. Lloyd, Jr., and James M. Lloyd this 16th day of March, A. D. 1888.

CHARLES T. HILLS,
Clerk of the District Court of Stutsman County, Dakota.

91 TERRITORY OF DAKOTA,
County of Stutsman, } *ss:*

I, Charles T. Hills, clerk of the district court of Stutsman county, Dakota, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount, and I further certify that I would accept them as obligors for that amount if offered to me as such in a proceeding in the above-named court, of which I am clerk.

CHARLES T. HILLS,
Clerk of the District Court of Stutsman County, Dakota.

I approve the foregoing bond this 16th day of March, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of the Territory of Dakota.

(Indorsement:) Supreme court of the Territory of Dakota. Filed April 25, 1888. J. H. C., Young, clerk.

92 The United States of America to Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, Greeting:

Whereas Stutsman County has, on the 24th day of February, A. D. 1888, appealed to the Supreme Court of the United States from a

judgment rendered on the 26th day of May, A. D. 1887, in the supreme court of the Territory of Dakota, in favor of you, the said Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, and against the said Stutsman County, for the sum of $35,820.15, damages, and $78.95, costs, and has filed the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, and show cause, if any there be, why the errors mentioned and complained of in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of Yankton, Dakota, this 16th day of March, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of the Territory of Dakota.

93 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, County of Burleigh, }

I, D. W. Maratta, United States marshal of the Territory of Dakota, being duly sworn, do say that on the 10th day of May, A. D. 1888, I served a true copy of the within appeal, order of allowance thereof, bond for costs, and of this citation upon Dodge & Camp and John S. Watson, the attorneys of record for Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, by delivering to and leaving with each of them the same at the city of Jamestown, Dakota.

D. W. MARATTA,
United States Marshal for Dakota Territory.

Subscribed in my presence and sworn to before me by D. W. Maratta, United States marshal for the Territory of Dakota, this 12th day of May, A. D. 1888.

E. G. EDGERTON,
U. S. Commissioner for the Territory of Dakota.

(Indorsement:) Supreme court of the Territory of Dakota. Filed May 12, 1888. J. H. C. Young, clerk.

94 THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court.

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, is [are] plaintiff- and respondent- *versus* Stutsman County, defendant and appellant, as the same

now remains of record in said court, together with copy of the records of the said supreme court of the Territory of Dakota, so far as relates to said action; also that the citation herewith is the original citation issued by the supreme court of the Territory of Dakota in said action.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 1st day of September, A. D. 1888.

[Seal Supreme Court of Dakota Territory.]

JAMES H. C. YOUNG, *Clerk.*

95 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-eight.

CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of Daniel H. Wallace, Appellees,
vs.
STUTSMAN COUNTY, Appellant.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, D. C., comes the said Stutsman County, by Roderick Rose and John F. Dillon, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in deciding that the lands mentioned and described in Schedules "A" and "B" and annexed to plaintiffs' complaint were not subject to and liable for the taxes therein described, and that there were no taxes due thereon when sold.

Second. The court erred in deciding that the lands were sold by the mistake and wrongful act of the treasurer of Stutsman county.

Third. The court erred in deciding that plaintiffs were entitled to recover from defendant the amount paid for said lands at said sales and the amount paid for subsequent taxes thereon, together with thirty per cent. interest thereon, and on the whole amount from and after the date of such payments to this date (April 13th, 1887).

Fourth. The court erred in overruling defendant's motion for judgment against plaintiffs, said motion being based upon the grounds specified therein.

Fifth. The court erred in overruling defendant's motion for new trial, said motion being based upon the grounds specified therein. See Transcript, page 36.

Sixth. The court erred in affirming in all things the judgment of the district court or court below, and in giving plaintiffs judgment for any sum whatever.

And the said Stutsman County prays that the judgment aforesaid may be reversed, annulled, and that it may be restored to all things which it hath lost by occasion of the said judgment.

RODERICK ROSE AND
JOHN F. DILLON,
Attorneys for Appellant.

96 The United States of America to Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, Greeting:

Whereas Stutsman County has, on the 24th day of February, A. D. 1888, appealed to the Supreme Court of the United States from a judgment rendered on the 26th day of May, A. D. 1887, in the supreme court of the Territory of Dakota, in favor of you, the said Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, and against the said Stutsman County, for the sum of $35,820.15, damages, and $78.95, costs, and has filed the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, and show cause, if any there be, why the errors mentioned and complained of in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of Yankton, Dakota, this 16th day of March, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of the Territory of Dakota.

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, County of Burleigh, }

I, D. W. Maratta, United States marshal of the Territory of Dakota, being duly sworn, do say that on the 19th day of May, A. D. 1888, I served a true copy of the within appeal, order of allowance thereof, bond for costs, and of this citation upon Dodge & Camp and John S. Watson, the attorneys of record for Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, by delivering to and leaving with each of them the same at the city of Jamestown, Dakota.

D. W. MARATTA,
United States Marshal for Dakota Territory.

Subscribed in my presence and sworn to before me by D. W. Maratta, United States marshal for the Territory of Dakota, this 12th day of May, A. D. 1888.

E. G. EDGERTON,
United States Commissioner for the Territory of Dakota.

97 JAMESTOWN, D. T., *May* 10, 1888.

Received this day from U. S. marshal of Dakota a copy of the foregoing citation.

DODGE & CAMP.
JNO. S. WATSON.

[Endorsed:] Original. Supreme court, Territory of Dakota. Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace, plaintiffs & respondents, *vs.* Stutsman County, defendant & appellant. Citation on appeal to the Supreme Court of the United

States. Roderick Rose, attorney for Stutsman County, Def'ts, &c., Jamestown, D. T.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 12, 1888. J. H. C. Young, clerk.

98 THE UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the judges of the supreme court of the Territory of Dakota, Greeting:

Whereas in a certain suit in said supreme court, between Stutsman County, appellant, and Charles S. Wallace and James M. Martin, as assignees of Daniel H. Wallace, respondents, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit, "that there is omitted therefrom the entry of the remittitur of the proceedings had in said court to the court below, to wit, the district court of Stutsman county, which remittitur, as by the records of said court appears, was made June 22, 1887; also that the clerk of the supreme court of said Territory has omitted to annex to and transmit with the record in said cause a copy of the opinion giving the reasons and grounds assigned by the supreme court of said Territory for refusing a rehearing of said case on motion of said appellant, filed with the order and decree made in the matter of said motion on Feb'y 24, 1888, and before the allowance of their appeal by the chief justice of said court to this Court:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme
99 Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23d day of January, A. D. 1889.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

100 UNITED STATES OF AMERICA, }
Territory of Dakota. }

In Supreme Court.

In Cause CHARLES S. WALLACE and JAMES M. MARTIN, Assignee of Daniel H. Wallace, Plaintiffs and Respondents,
versus
STUTSMAN COUNTY, Defendant and Appellant.

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that, in obedience to the

accompanying order of the Supreme Court of the United States, dated the 23rd day of January, A. D. 1889, commanding me to search the records and proceedings in said above-mentioned cause and to certify certain omissions that appear in the transcript heretofore sent to said Supreme Court, that I have so searched the records and proceedings of the said supreme court within and for the Territory of Dakota as therein commanded, and that I find therein that the following are the omissions in said transcript in said cause complained of, to wit:

That the remittitur in said cause from the supreme court of the Territory of Dakota was sent by me, as clerk of said court, to the district court within and for Stutsman county, in the Territory of Dakota, on the 22nd day of June, A. D. 1887, and that the opinion filed by said supreme court of the Territory of Dakota in said cause on the petition for rehearing was filed on the 24th day of February, A. D. 1888, and is in the following words, to wit: "The motion for rehearing in the case of Charles S. Wallace *et al. vs.* Stutsman
101 County is denied upon the ground that this court, after filing of remittitur in the lower court without allegation of inadvertence, fraud, or mistake, has lost jurisdiction.

"All the justices concurring."

And that the foregoing are all the omissions found in the records and proceedings of the supreme court within and for the Territory of Dakota complained of under said order and which I am required to certify to thereunder, and I do hereby certify that they are a true and correct copy and transcript of said records and proceedings.

Seal Supreme Court of Dakota Territory

In witness whereof I have hereunto set my hand and affixed the seal of the said court this sixteenth day of February, A. D. 1889.

JAMES H. C. YOUNG, *Clerk.*

102 [Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 1076. Stutsman County, app't, *vs.* Charles S. Wallace *et al.* Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed Feb. 25, 1889. James H. McKenney, clerk.

Endorsed on cover: Dakota Territory supreme court. No. 1076. Stutsman County, appellant, *vs.* Charles S. Wallace and James M. Martin, as assignee of Daniel H. Wallace. Filed September 6, 1888.

Supreme Court, U. S.
FILED.
NOV 11 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 89.

STUTSMAN COUNTY,

Appellant,

vs.

CHARLES S. WALLACE ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

APPENDIX TO BRIEF FOR APPELLANT, CONTAINING A REFERENCE TO STATUTES AND DECISIONS.

JOHN F. DILLON,
HARRY HUBBARD,
Of Counsel for Appellant.

..., New York..

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 89.

STUTSMAN COUNTY,
Appellant,

vs.

CHARLES S. WALLACE ET AL.

Appendix to Brief for Appellant.

For the convenience of the Court and counsel we have printed separately the statute of Dakota, also the statutes of certain States, which authorize the recovery back, in certain cases, of the purchase money paid at tax sales. We have also printed the syllabus prepared by the Court in *Tyler vs. Cass County*, 48 N. W. Rep., 232 (a case exactly like the present one), decided by the Supreme Court of the State of North Dakota. This case arose when Chapter 28 of the Political Code of the Territory of Dakota of 1877 was in force. That chapter was a complete revenue law. An abstract of this chapter is printed below.

The statute under which the plaintiffs claim is as follows:

SEC. 78. "When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harm-

less by paying him the amount of principal and interest, to which he would have been entitled had the land been rightfully sold, *and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer.*"

Dakota Political Code, Sec. 78, Ch. 28 (Levisee, 2d Ed., p. 483).

The following are analogous statutes of other States referred to in the briefs of counsel and in certain decisions referred to by them.

Present Nebraska Statute.

"Sec. 131. (County to hold purchaser harmless—Treasurer liable for errors.) When by mistake or wrongful act of the Treasurer, *or other officer*, land has been sold on which no tax was due at the time, *or whenever land is sold in consequence of error in describing such land in the tax receipt*, the county is to hold the purchaser harmless by paying him the amount of principal and interest *and costs* to which he would have been entitled had the land been rightfully sold, and the Treasurer *or other officer* and their bondsmen will be liable to the county *to the amount of their official bond;* or the purchaser, *or his assignee*, may recover directly of the Treasurer *or other officer, in an action brought to recover the same in any Court having jurisdiction of the amount, and the judgment shall be against him and his bondsmen; but the Treasurer or other officer and their bondsmen shall be liable only for their own and deputies' acts.*"

Compiled Statutes, Nebraska (1889), Ch. 77, Sec. 131.

The original statute of Nebraska was *exactly the same as Sec. 78 of the statute of Dakota* above quoted (see Statutes of Nebraska, 1867, p. 331, Ch. 46, Sec. 75). By several amendments, one in 1871, and others of a later date, this statute of Nebraska was amended, as shown above by the italics, so as to read as it is quoted above.

Present Iowa Statute.

"When, by mistake or wrongful act of the Treasurer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs, to which he would have been entitled had the land been rightfully sold, and the Treasurer and his bondsmen will be liable to the county to the amount of his official bond; or the purchaser, or his assignee, may recover directly of the Treasurer, in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen; but the treasurer or his bondsmen shall be liable only for his own or his deputies' acts."

1 McLain's Annotated Statutes, Iowa, Sec. 899, p. 229.

Another Iowa Statute.

"SEC. 901. Whenever it shall be made to appear to the satisfaction of the County Treasurer, either before the execution of a deed for real property sold for taxes or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of sales that the same was erroneously sold, and such entry shall be evidence of the fact therein stated. And in such cases the purchase money shall be refunded to the purchaser, as provided by this chapter."

Revision of 1860, § 789.
Code of 1873, § 901.

This Section 901 was in force when the decisions in *Morris vs. County of Sioux*, 42 Iowa, 416, and *Scott vs. Chickasaw County*, 46 Iowa, 253, were rendered, and now exists as Section 901 of the Code (see 1 McLain's Annotated Statutes, p. 230).

Original Iowa Statute.

The original Iowa Statute, from which all the others herein quoted appear to have been taken, was as follows:

"509. When by the mistake or wrongful act of the Treasurer, land has been sold on which no tax was due at the time, the county is to hold the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the Treasurer and his sureties will be liable for the amount to the county on his bond; or the purchaser may recover directly of the Treasurer."

Code of Iowa, 1851, Title 6, Ch. 37, § 509.

Wisconsin Statute.

"MONEY TO BE REFUNDED ON VOID SALES, SECTION 1184. If, after the sale or conveyance of any lands sold for the non-payment of taxes, and within the time hereinafter prescribed, it shall be discovered that the sale, or the certificate issued thereon, was invalid, the County Board shall make an order, briefly stating the reason therefor, directing that the money paid for such certificate on the sale, and all subsequent charges thereon, and all subsequent taxes paid on the lands described therein, by the purchaser or his assigns, be refunded, with interest at the rate of seven per cent. per annum, to such purchaser or his assigns, upon the delivery of the certificate or deed to be canceled; and if the County Treasurer shall, in pursuance of such order, offer to the person entitled thereto his money as aforesaid, and he shall refuse to receive the same and cancel the certificate or deed, he shall not be entitled to receive any interest on the money so paid by him, after the day of such offer and refusal; nor shall any recovery ever be otherwise had against the county on such deed or certificate."

1 Wisconsin Annotated Statutes (Sanborn & Berryman), p. 737, Sec. 1184.

Kansas Statutes.

"(6999) WHEN LAND OUGHT NOT TO BE SOLD OR CONVEYED. § 145. If the County Treasurer shall discover, before the sale of any lands or lots for taxes, that on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, the Board of County Commissioners shall discover that, for any error or irregularity, such lands or lots ought not to be conveyed, they may order the County Clerk not to convey the same, and the County Treasurer shall, on the return of the tax certificate with a certified copy of such order of the Board of County Commissioners, refund the amount paid therefor on such sale and such subsequent taxes and charges paid thereon by the purchaser, or his assigns, as may be so ordered by the Board of County Commissioners, out of the county treasury, with interest on the amount so ordered refunded at the rate of ten per cent. per annum; and in all cases in which actions shall be now pending or may be hereafter commenced, the refusal of the County Clerk to convey any lands or lots indorsed on any tax certificate shall not be deemed or held to constitute *prima facie* evidence of any irregular assessment or other error for which such land or lots ought not to be conveyed, nor shall any judgment be recovered against such county, or the Board of County Commissioners thereof, or liability held to attach therefor, under or by virtue of provisions of said section one hundred and forty-five, as heretofore or hereafter existing, or of section one hundred and twenty of chapter one hundred and seven of the General Statutes, except in cases in which the Board of County Commissioners shall have made an order for the refunding thereof, and then only for the amount specified in the order for such refunding, and in all cases in which invalid taxes shall be included in such certificate, and only to the extent of such invalid taxes, with ten per cent. interest thereon (Laws 1876, Ch. 34, § 145, as amended by Laws 1879, Ch. 40, § 2, May 20)."

"(7000) SALE INVALID; PROCEEDINGS. § 146. If, after the conveyance of lands or lots sold for taxes, it

shall be discovered, or adjudged, that the sale was invalid, the Board of County Commissioners may, by proper order, cause the money paid therefor on the sale, together with such subsequent taxes and charges paid thereon by the purchaser or his assigns as they may judge proper, to be refunded, with interest on such amount at the rate of ten per cent. per annum, upon the delivery of a quit-claim deed from the party holding under the tax deed, executed to such person or persons as the commissioners may direct in such order. In all such cases no interest shall be allowed after the person claiming under the tax deed shall have received notice that such deed has been discovered or adjudged invalid and the order for such refunding has been made (Laws 1876, Ch. 34, § 146, as amended by Laws 1879, Ch. 40, § 3, May 20)."

(7001) SALE SET ASIDE; PROCEEDINGS. § 147. When a tax sale shall be set aside as invalid and money and interest have been refunded thereon, or when any refunding shall have been made under the provisions of said sections one hundred and forty-five and one hundred and forty-six, or sections one hundred and twenty and one hundred and twenty-one of chapter one hundred and seven of the General Statutes, the proportions thereof which have been paid as taxes to the State, township, city, school district, etc., with interests and costs thereon, shall be refunded to the county, and on the next settlement thereafter the county Treasurer of such county shall be credited therewith on the certificate of the County Commissioners (Laws, 1876, Ch. 34, § 147, as amended by laws 1879, Ch. 40, § 4, May 20)."

2 General Statutes, Kansas, 1889, Ch. 107, Sections 145, 146, 147.

In *Tyler vs. Cass County*, above referred to, and the syllabus of which appears below, the Supreme Court of North Dakota says:

"The States of Iowa and Nebraska have similar statutes. So far as we can trace it, the statute originated in the Iowa Code of 1851, where it appears in language almost identical with our Section 78 of Chapter 28 of the Code of 1877. We do not find the Iowa

statute construed by the Courts of that State until after the revision of 1860, when the statute appears in a changed form, and reads: 'When, by the mistake or wrongful act of the Treasurer, land has been sold on which no taxes were due, *or were erroneously assessed*,' etc., and closes by making the Treasurer liable only for his own acts and those of his deputy. This statute was before the Supreme Court of Iowa in Coulter vs. County of Manhaska, 17 Iowa, 92; but in that case the liability of the county for the principal and interest was conceded, and the sole point in dispute was whether or not the county was liable for a 30 per cent. penalty allowed by the Iowa statutes, and the Court held that it was not. In Morris vs. County of Sioux, 42 Iowa, 416, cited by respondent, there was no question under the statute before the Court; and Scott vs. Chickasaw Co., 46 Iowa, 253, was a clear case of wrongful assessment, and within the strict words of the Iowa statute.

In Nebraska the law was originally taken from Iowa, but was changed in 1871 to read: 'When by the mistake or wrongful act of the treasurer *or other officer*, land has been sold contrary to the provisions of this act,' etc.; and making such treasurer or other officer liable over to the county on their official bonds. And by a later enactment (see section 131, Revision 1881, Neb.) the statute is again changed to read as follows: 'When by the mistake or wrongful act of the Treasurer *or other officer*, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless,' etc.; and closing by declaring that such Treasurer or other officer shall be liable only for their own and deputies' acts. The cases of McCann vs. Otoe Co., 9 Neb., 324; 2 N. W. Rep., 707; Roberts vs. Adams Co., 18 Neb., 473; 25 N. W. Rep., 726, and *co nomine*, 20 Neb., 411; 30 N. W. Rep., 405, are cited in support of the judgment in this case; but all those cases were decided after the change in the statute, and the two latter after the second change. What constitutes the illegality is not disclosed in the case in 9 Neb. and 2 N. W. Rep. The Court simply remarked that the plaintiff had brought himself within the provisions of their revenue

law, and was entitled to recover, and added: 'The question of the liability of the Treasurer or other officer making the mistake or error is not, under the issues, involved in the case.' The other cases were precisely alike in principle. The title to the lands was in the United States, and it was alleged 'that said lands were wrongfully placed upon said tax-list by said defendant's Commissioners and said defendant's Assessor.' It is evident in these cases (*i. e.*, the Dakota cases) that the sale occurred through the mistake of the Assessor, unless, indeed, it is the duty of the Treasurer to ascertain for himself, in each instance, whether or not the land is subject to taxation—a point to be considered further on. The Statutes of Iowa and Nebraska differ so radically with each other and with ours that it is evident that the decisions under one statute establish no precedent to be followed in the construction of the others. There is another class of statutes making counties liable generally to refund to tax-sale purchasers when the tax-sale is invalid, irrespective of any liability over on the part of any officer through whose mistake or wrongful act the sale was made. Such statutes are found in Kansas, Minnesota, Iowa, Wisconsin, Pennsylvania, New York and in North Dakota since the passage of Chapter 132, Laws 1890, and perhaps other States.

Tyler vs. Cass County.

The following is the syllabus *(by the Court)* of the decision in the case of *Tyler vs. Cass County*, 48 N. W. Rep., 232, decided by the Supreme Court of the State of North Dakota. That case was, in all material respects, exactly like the present one; and that Court, after a full consideration, both of the common law rules and the Dakota statute referred to by appellees, decided that there could be no recovery either at common law or under the statute. The syllabus of the case is as follows:

TYLER vs. CASS COUNTY.

Supreme Court of North Dakota. Nov. 29, 1890.

"TAXATION—RAILROAD LAND GRANTS—EXEMPTIONS—POWERS OF ASSESSOR—TAX-SALES—RECOVERY OF MONEY PAID.

"1. The defendant county, through its Treasurer, sold certain lands for delinquent taxes at the annual tax-sale in October, 1885. The lands so sold were a part of the original grant by the general government to the Northern Pacific Railroad Company. The lands were surveyed at the expense of the United States, and earned by said company after the passage of the Act of Congress of July 15, 1870, pertaining to survey fees; and no part of said survey fees had been repaid to the United States at the time of such sale. Prior to the assessment and levy of said taxes, for which said lands were sold, the railroad company had disposed of the lands, and conveyed them to third parties by deeds and contracts, and such third parties were in possession. Said lands were regularly assessed, and all the proceedings leading up to the tax-sale were regular. Plaintiff bought the lands at such tax-sale, and brings this action to recover the purchase money so paid. *Held*, that such lands were not taxable at the time of such assessment, because the United States held the fee title to said lands, and had a lien thereon for the survey fees (Railroad Co. vs. Rockne, 115 U. S., 600, 6 Sup. Ct. Rep., 201); but that, since land was a subject of taxation in Dakota territory, *prima facie* these lands were taxable. Taxation was the rule; freedom from taxation the exception.

2. *Held, further*, that the assessor, being a judicial officer, where property is exempted from taxation by class, and not by specific description, he has full jurisdiction, and it is his duty to decide in each instance whether or not a particular piece of property falls within any of the exempted classes, and in this respect the source of the law that establishes the exemption is immaterial.

3. *Held, further*, that an erroneous decision of an assessor in the matter of exemptions does not deprive the tax proceedings of jurisdiction; but, until such erroneous decision is modified or set aside by the proper tri-

bunal, all officers with subsequent functions may safely act thereon.

4. Upon a right of recovery at common law there is nothing in this case to relieve the plaintiff from the rule of *caveat emptor*, as announced by this Court in the case of Budge vs. City of Grand Forks, 47 N. W. Rep., 390 (decided at this term).

5. Under the law in force when such sale was made, the Treasurer, in the matter of the collection of the taxes, was purely a ministerial officer; and when he received the duplicate tax-list, with the warrant of the County Commissioners attached, if such process was fair on its face, and contained nothing that would apprise the Treasurer of any defects or infirmities, and in a case where it does not appear that the Treasurer had any knowledge of any defects or infirmities, such Treasurer was fully protected from personal liability in collecting the taxes upon all property contained in his said list, so long as he acted strictly within the statute. The law furnished his authority for selling property for delinquent taxes; the warrant, with the tax-list attached, furnished him the subjects upon which to exercise such authority.

6. The statute (Comp. Laws, § 1621), which required the Treasurer to 'sell all lands liable for taxes of any description for the preceding year or years,' meant all lands liable for taxes, as shown by the process in his hands. He could not refuse to sell lands on his list, nor could he sell lands not on his list.

7. Section 1629, Comp. Laws, then in force, read as follows: 'When, by mistake or wrongful act of the Treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of the principal, and interest at the rate of twelve per cent. per annum from the date of sale, and the Treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer.' *Held*, that the sale of the lands in this case was neither the mistake nor the wrongful act of the Treasurer, within the meaning of said section, and that plaintiff has no right of action under said section.

8. Section 84, c. 132, of the Laws of North Dakota for 1890 has no application to a sale of lands made before the enactment of said chapter.

(Syllabus by the Court)."

We print here an abstract of the statutes of Dakota showing the general scheme of collecting taxes and making tax sales, and the duties and powers of the various officers in relation thereto. Chapter 28, Pol. Code 1877, as amended from time to time, down to the time of the sale complained of, contains a complete code of procedure for the assessment, levy and collection of taxes. The first three sections, with their subdivisions, name all the classes of property liable to taxation, and contain a specific enumeration of such property as is exempt from taxation; in the first subdivision in which exempt property is found, are the words: "The property of the United States, and of the Territory, including school lands."

The next twenty-three sections provide for the assessment of "taxable property" and prescribe fully the manner of proceeding by the assessor in making up the assessment roll. He is required to list and assess "all taxable property, real and personal," on or before the first Monday of May in each year, at its cash value at the place of listing on the first Monday of April preceding; and for the purpose of making such list and assessment, he has power to demand from every person, or firm, or the managing agent of any corporation or company, an itemized statement of his or its property, real and personal, and, "if any person, firm, officer, or agent shall neglect or refuse, on demand of the assessor, to give, under oath or affirmation, the statement required by this section, the assessor shall ascertain and estimate from the best information he can obtain, the number, amount and cash value of all the several species of property required, and shall list the same

accordingly, and the value so fixed by the assessor shall not be reduced by the County Board of Equalization." And he may also, in case of unknown owners, ascertain, from the best information he can obtain, its value, and he is made by these provisions of the statute in the first instance, the judge of what is and what is not "taxable property."

Sections 26 and 27, inclusive, prescribe the form of the assessment roll. Sections 28, 29 and 30 provide for the equalization of the assessment roll by the Board of County Commissions, and such board is given powers of correcting errors made in the list by the assessor, and of adding thereto any "taxable property" omitted by the assessor.

Sections 31 and 32 provide for forwarding abstracts of assessments to the Territorial Auditor, and for equalization by the Territorial Board for Territorial purposes, and for the levy of Territorial taxes.

Sections 33 to 39 inclusive, prescribe the rates and the date and levy of taxes, and the preparation of duplicate tax lists by the County Clerk with their form, one of which lists is retained by the County Clerk, and the other forwarded with the warrant of the County Commissioners attached, to the County Treasurer.

Section 40 provides as follows:

"An entry is required to be made upon the tax list and its duplicate showing what it is, and for what county and what year it is, and the County Commissioners shall attach to the lists their warrants, under their hand and official seal, in general terms, REQUIRING THE TREASURER TO COLLECT THE TAXES THEREIN LEVIED ACCORDING TO LAW, and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal; the County Clerk shall take the receipt of the County Treasurer, on delivering to him

the duplicate tax list, with the warrant of the County Commissioners attached, and such list SHALL BE FULL AND SUFFICIENT AUTHORITY FOR THE COLLECTION BY THE TREASURER OF ALL TAXES THEREIN CONTAINED."

Sections 41 to 44, inclusive, provide for the collection of taxes and the form of receipts. The Treasurer is not required to personally make demands for taxes, but may remain at his office at the county seat, and taxpayers are expected to make payment to him there. He is required to make receipts in duplicate, one of which is given to the taxpayer and the other is sent to the County Clerk.

Section 45 provides:

"It shall be the duty of the County Clerk, on receiving any duplicate tax receipt from the Treasurer, forthwith to examine the same and compare it with the tax list in his possession, and see if the total amount of taxes and the several amounts of the different funds are correctly entered and set forth in such receipt; and in case it shall appear that the Treasurer has not collected the full amount of taxes and interest, which according to the tax list and the terms of the receipt he should have collected, then the County Clerk shall forthwith charge the Treasurer with with the amount such receipt falls short of the true amount, and the Treasurer shall be liable on his official bond to account for and pay over the same."

Sections 46 to 51 inclusive, provide for the Treasurer's cash-book, its form and duplicate cash-book kept by the County Clerk.

Section 52 reads as follows:

"If on the assessment roll or tax list there be any error in the name of the person assessed or taxed, the name may be changed and the tax collected from the person intended, if he be taxable and can be identified by the Assessor or Treasurer; and when the Treasurer, after the tax list is committed to him, shall ascertain

that any land or other property is omitted, he shall report the fact to the County Clerk, who, upon being satisfied thereof, shall enter the same upon his assessment roll, and assess the value, and the Treasurer shall enter it upon the tax list, and collect the tax as in other cases."

Sections 53 to 56 inclusive, provide for delinquency, penalty for non-payment and lien of taxes.

Sections 57 to 59 inclusive, provide for collection of taxes by distress and sale of personal property.

Sections 60 to 69 inclusive, provide for sale of real property for taxes, and prescribe the form for certificate of sale.

Section 62, already given, is the one relied upon as conferring judicial powers upon the Treasurer.

Section 60 prescribes the manner of adding district and other local taxes to the county and Territorial list, and for advertising the lands upon which they are liens for sale.

Section 61 prescribes the form of notice of such sale, the date and length of publication, &c.

Section 62 Pol. Code, as amended in 1879, which reads as follows:

"That on the first Monday of October in each year, between the hours of 9 o'clock A. M. and 4 o'clock P. M., the Treasurer is directed to offer at public sale, at the court house, or place of holding courts in his county, or at the Treasurer's office, where, by law, the taxes are made payable, all lands, town lots, or other real property, which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid, and he may adjourn the sale from day to day until all the lands, lots or other real property have been offered, and no taxable property shall be exempt from levy and sale for taxes."

Section 63 requires the land to be sold to the person who will pay the tax on the whole for the smallest amount of land, and requires that the homestead shall be sold last.

Section 64 provides for again selling, when party bidding fails to take the land.

Sections 65, 66, 67 and 68 provide for the return of the sale to the County Clerk and the fees of the officer.

Section 69 provides for private sale of lands not sold at public sale, and concludes with the provision:

"And the Treasurer is further authorized and required to sell as aforesaid all real estate in his county on which taxes remain unpaid and delinquent for any previous year or years."

Sections 70 to 72 inclusive, provide for redemption from tax sale.

Sections 73 to 77 inclusive, prescribe the form of the deed and provide for its execution and record, the limitations of actions to set aside and when tax sales are not voidable.

Section 78 is the one we are construing (quoted literally *ante* p.).

Section 79 permits the Court to enter judgment for taxes due, in actions to set aside tax sales, &c.

Sections 80 to 82 inclusive, provide for certain Territorial taxes, licenses of peddlers, &c.

Section 83 requires the County Treasurer to pay over to the Territorial Treasurer on or before the first Monday in November, and at all other times on demand, all Territorial funds collected by him, and prescribes his fees for such collection and receipt.

Section 84 provides as follows:

"If the County Treasurer shall willfully and negligently fail to settle with the Territorial Treasurer at the time and in the manner above prescribed by law, he shall forfeit to the use of the Territory the sum of five hundred dollars, which sum may be recovered of him, or his sureties, on suit brought by the Territorial Treasurer in any Court in this Territory having jurisdiction; or in case of failure of the Territorial Treasurer to bring such suit, then any citizen of the Territory may bring the same."

Section 85 provides for the procuring by the Territorial Auditor of a list from the proper land officers of all lands becoming taxable for the first time, and the forwarding of such list to the Clerk of the county in which such lands lie, on or before the 30th of July in each year.

Section 86 prescribes the form of the warrant-book and record of the county warrants of the county.

And the remaining sections of the chapter, 87 to 105 inclusive, are miscellaneous provisions. Of these sections, 89 reads as follows:

"In the case of dereliction of duty on the part of any officer or person required by law to perform any duty under the provisions of this act, in any county in this Territory, such person shall thereby forfeit all pay and allowance that would otherwise be due him, and the County Commissioners in any such county, on receiving satisfactory evidence of such dereliction or failure to perform, as required by law, any duty enjoined by this act, shall refuse to pay such person or persons any sum whatever for such services."

Sections 95 and 96 read as follows:

SECTION 95. "If any County Treasurer shall fail to make return, fail to make settlement, or fail to pay

over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the County Clerk, on receiving instructions for that purpose from the Territorial Auditor, or from the County Commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the District Court of his county."

SECTION 96. "Whenever suit shall have been commenced against any delinquent County Treasurer as aforesaid, the Board of County Commissioners of such county, may, at their discretion, remove such treasurer from office, and appoint some suitable person to fill the vacancy thereby created, as hereinbefore provided."

Sections 94 and 95, C. 21, Pol. Code, prescribing the duties of the County Treasurer, read as follows:

SECTION 94. "He shall be the collector of taxes; shall keep his office at the county seat, and shall attend his office three days in each week. He shall be charged with the amount of all tax lists in his hands for collection, and credited with the amounts collected thereon, and the delinquent list, and shall keep a fair and accurate current account of the moneys by him received, showing the amount thereof, the time when, from whom, and on what account received, in cash, warrants, county or road orders, and if in warrants or orders, their kind, number, or other designation, amounts for which they were drawn, interest due thereon, and the amounts of the receipts thereon endorsed, if any; also of all disbursements by him made, showing the time when, to whom, on what account, and the amount paid; and he shall so arrange his books that the amounts received and paid on account of each separate and distinct fund or appropriation, shall be exhibited in separate and distinct columns or accounts, and so as to show whether the same was received or paid in cash, or warrants, or orders, and if either of the latter, their designation and other particulars as above required; and the County Treasurer shall at all times exhibit such accounts, when desired, to the Territorial, county or school officers, entitled to receive the same, and shall at any time pay over the

balance in his hands to them, upon receiving proper vouchers."

SECTION 95. "The books, accounts and vouchers of the County Treasurer, and all moneys, warrants or orders remaining in the treasury, shall at all times be subject to the inspection and examination of the Board of County Commissioners, and at the regular meetings of the Board in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as Treasurer, and for that purpose shall exhibit to them all his books, accounts and moneys, and all vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement; and, if found correct, the account shall be so certified; if not, he shall be liable on his bond."

These are the only provisions of statute regulating or governing the conduct of the County Treasurer in the collection and disbursement of the public revenues. From these provisions of the statute it will be observed that the Treasurer acts, not only as the Treasurer of the county, but the financial agent of the Territory and local municipalities as well, in the collection and receipt of taxes levied by them; and that in these several capacities he is not only Treasurer, but collector as well. These various provisions of statute which we have given by analysis and exemplification will be found to differ in no very essential particular from the revenue laws in most of the Western States, from which they have been largely copied. The duties of each officer in the collection and disbursement of the revenue is here carefully marked out.

FIRST. The statute carefully enumerates the classes of property that are taxable, and specifies in detail the classes of property that are exempt.

SECOND. It commits to the Assessor the listing and determination of what property is taxable and what is exempt.

THIRD. It commits to the County Commissioners, as a board of equalization, the revision of the Assessor's work, the levy of the county taxes, and the issuing of the warrant, "requiring the Treasurer to collect the taxes therein levied according to law."

FOURTH. It charges the Treasurer "with the amount of all tax lists in his hands for collection," and requires him "to collect the taxes therein levied according to law;" and it further provides for his protection that "such list shall be full and sufficient authority for the collection by the Treasurer of all taxes therein contained."

For a full discussion of general principles and of the rule that *at common law* and independently of statute there can be no recovery back of money paid for illegal taxes, *except when paid under compulsion*. See 2 Dillon Municipal Corporations, §§ 939-947.

JOHN F. DILLON,
HARRY HUBBARD,
For the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

Office Supreme Court U.S.
FILED,
NOV 6 1891
JAMES H. McKENNEY

No. 89.

STUTSMAN COUNTY,

Appellant,

vs.

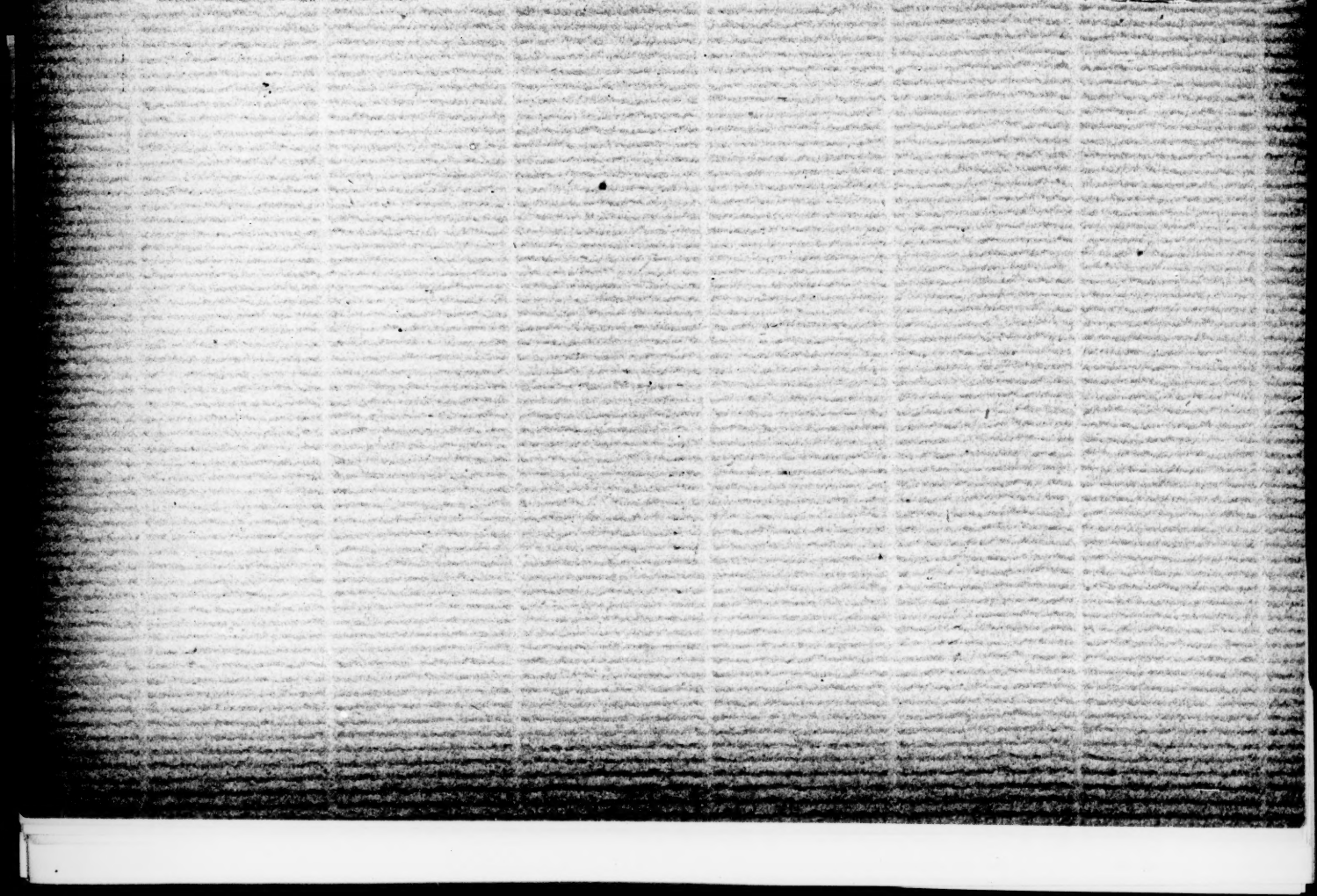
CHARLES S. WALLACE ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR APPELLANT.

JOHN F. DILLON,
HARRY HUBBARD,
Of Counsel for Appellant.

C. G. Burgoyne, Walker and Centre Sts., New York.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 89.

STUTSMAN COUNTY, *Appellant*, vs. CHARLES S. WALLACE *et al.*	Brief for Appellant.

Statement of the Case.

This is an appeal from the final judgment of the Supreme Court of the Territory of Dakota (Record, pp. 40–41, 45), affirming the judgment of a District Court of that Territory in this case (Record, p. 40). The plaintiffs below, who are the appellees in this Court, brought this action in the District Court of the Territory of Dakota, September 28, 1886 (Record, p. 1), to recover from Stutsman County certain money which plaintiffs alleged they had paid said county for certain lands which the treasurer of said county had assumed to sell to plaintiffs, which sale plaintiffs alleged was invalid. The plaintiffs also sought in this action to recover the amount of taxes paid by them on said lands after such purported sale to them.

COMPLAINT. The complaint (Record, p. 2 *et seq.*), set forth the facts of the case substantially as they are stated in the stipulation of facts (Record, p. 27) referred to more fully below.

DEMURRER. The defendants demurred to the complaint (Record, p. 25), but this demurrer was afterwards withdrawn by consent (Record, p. 26).

ANSWER. The defendants then made answer denying each and every allegation of the complaint (Record, p. 27).

The action was tried by the District Court for Stutsman County on a stipulation of facts made by the parties thereto (Record, pp. 27–33).

Stipulation of Facts.

The facts of the case, as they appear from the stipulation in the record (p. 27) are substantially as follows:

It appears that the real estate in question was a part of the original grant by the United States to the Northern Pacific Railroad Company; that no patents were issued for said lands; that the railroad company earned said lands after the passage of the Act of Congress of date July 15th, 1870, in regard to payment of

costs for surveying; that said lands were surveyed at the expense of the United States Government, and after the passage of said Act of Congress, and no part of the cost and expenses of said survey had, at the time of said tax sales been repaid by said railroad company to the United States, as provided by the last-mentioned Act of Congress; that in the years 1880 and 1882 the taxing officers of the defendant county proceeded to assess and levy taxes on the respective lands in question, all of which remained unpaid, and that afterwards the treasurer of said county proceeded to sell said lands for delinquent taxes, and plaintiff, Charles S. Wallace, purchased the same, and it was to recover the purchase-money so paid (and subsequent taxes on part of said lands for the year 1881, paid by said Wallace), that this action was brought. No question is made as to the regularity of the tax sales or the proceedings leading thereto. It also appears, from the stipulation of facts, that in October, 1884, and September, 1885, the Northern Pacific Railroad Company brought suit in the District Court of the Territory against the Treasurer of the present defendant, said Stutsman County, and said Charles S. Wallace, in which suits said Railroad Company obtained decrees forever enjoining said Treasurer from making any tax deed, and said Wallace from receiving any tax deed, for said lands on account of said taxes. The stipulation also states that said plaintiff Charles S. Wallace assigned the tax certificates and the moneys so paid by him as purchase money at said tax sale, and as subsequent taxes, to James M. Martin as assignee for Daniel H. Wallace in trust for the payment of certain debts of said Charles S. Wallace, and the surplus in

trust for said Charles S. Wallace. The stipulation also states that prior to the commencement of this action the plaintiff presented to the Board of County Commissioners his claim for the repayment of such purchase moneys and subsequent taxes, and interest, and that his claim was not allowed.

MOTION FOR JUDGMENT.—The defendant made a motion for judgment (Record, p. 33), (1) because the complaint does not state facts sufficient to constitute a cause of action; (2) because the evidence fails to establish the necessary facts to enable plaintiffs to recover.

FINDINGS OF THE COURT.—On the facts as stipulated the Court found as conclusions of law (Record, p. 34) that the plaintiffs were entitled to recover "the amount paid for said lands at said sales and the amount paid as subsequent taxes thereon, with thirty per cent. interest thereon," and directed judgment for plaintiffs for that amount, which judgment was duly rendered (Record, p. 35).

EXCEPTIONS TO FINDINGS. The defendant duly excepted to the findings and orders of the Court, and these exceptions were duly allowed (Record, p. 36).

MOTION FOR NEW TRIAL. Afterwards defendant moved for a new trial, which motion was denied (Record, p. 37).

APPEAL TO SUPREME COURT OF TERRITORY. The defendant County duly appealed to the Supreme Court of the Territory from the order of the Court denying defendant's motion for judgment, and from the judgment of the Court, and from the order denying motion for new trial (Record, p. 1). The judgment roll of the District Court was certified by the Judge of that Court (Record, p. 38), and a copy of said judgment roll, also of the Judge's certificate and of the notice of appeal (Record, p. 1), were certified by the Clerk of said District Court, and with such Clerk's certificate were transmitted and filed with the Supreme Court of Dakota (Record, p. 39). The Supreme Court of Dakota heard the appeal and rendered judgment affirming the judgment of the District Court (Record, pp. 40-41). The defendant petitioned the Supreme Court of Dakota for a rehearing (Record, pp. 42, 43), which was refused (Record, pp. 44, 45).

APPEAL TO SUPREME COURT OF THE UNITED STATES. Thereupon the defendant petitioned the Supreme Court of Dakota for the allowance of this appeal to this Court, and its petition was granted (Record, p. 45). [Appeal, and not writ of error, is the proper means to bring this case before this Court, for the trial was not by a jury. Act of Congress, April 7, 1874, Ch. 80, Sec.

20 (18 St. at Large, 27). The appellant perfected its appeal to this Court in proper form; appeal bond was given (Record, p. 48); citation was issued by the Chief-Justice of the Supreme Court of Dakota to the appellees (Record, p. 49), and the record of this case in the Supreme Court of Dakota was certified by the Clerk of that Court (Record, p. 50); and assignment of errors by appellant was duly made (Record, p. 51). On suggestion of a diminution of the record of the Supreme Court of Dakota (by the omission of the entry of the remittitur to the District Court and of the opinion giving the reasons for the refusal of a rehearing as above mentioned), a writ of *certiorari* was issued by this Court to bring up the omitted parts of the record (Record, p. 53), to which writ a return was duly made (Record, pp. 53, 54).

Afterwards, to wit, October 28, 1889, there was presented to this Court a motion to dismiss the appeal or affirm the judgment on the grounds as alleged: 1. That the case was not pending in the Supreme Court of the Territory when the Chief-Justice allowed the appeal, and therefore he had no jurisdiction to allow the appeal. 2. That the record, as filed in this Court, was not the record in the case. This Court denied both the motion to dismiss and the motion to affirm. The appeal now comes on for a hearing on the merits.

Assignment of Errors.

(Record, p. 51.)

First. The Court erred in deciding that the lands mentioned and described in Schedules "A" and "B," and annexed to plaintiffs' complaint, were not subject

to and liable for the taxes therein described, and that there were no taxes due thereon when sold.

SECOND. The Court erred in deciding that the lands were sold by the mistake and wrongful act of the Treasurer of Stutsman County.

THIRD. The Court erred in deciding that plaintiffs were entitled to recover from defendant the amount paid for said lands at said sales, and the amount paid for subsequent taxes thereon, together with thirty per cent. interest thereon, and on the whole amount from and after the date of such payments to this date (April 13th, 1887).

FOURTH. The Court erred in overruling the defendant's motion for judgment against plaintiffs, said motion being based upon the grounds specified therein.

FIFTH. The Court erred in overruling defendant's motion for new trial, said motion being based upon the grounds specified therein (see Transcript, page 36).

SIXTH. The Court erred in affirming in all things the judgment of the District Court or Court below, and in giving plaintiffs judgment for any sum whatever.

I.

The plaintiffs (appellees) have no right at common law to recover the moneys in question.

It is clear that the plaintiffs have no remedy except by statute, and then only if their case falls within the terms of the statute. The law is well settled that a purchaser at a tax sale cannot, in the absence of statute, recover back the purchase money. This rule is settled by an overwhelming weight of authority and reason.

See

Cooly on Taxation, 2d Edition, pp. 476 and 553.
2 Desty on Taxation, p. 850.
Lynde vs. Melrose, 10 Allen, 49.
Breevoort vs. Brooklyn, 89 N. Y., 135.
Waples vs. United States, 110 U. S., 630.

Many more authorities might be cited, but the above are sufficient. In *Coffin vs. Brooklyn*, 116 N. Y., 159, a case directly in point, the New York Court of Appeals say (p. 156) that

"THE LAW IS SETTLED that the purchaser of a defective title at a tax sale cannot recover the money paid from the city and county for which taxes the land was sold (*Lynde vs. Melrose*, 10 Allen, 49; *Breevoort vs. Brooklyn*, 88 N. Y., 135)."

That this is the settled rule of law in North Dakota, as decided by the Supreme Court of that State, from which jurisdiction this present case comes, see the cases of *Budge vs. City of Grand Forks*, 47 N. W. Rep., 390, and *Tyler vs. Cass County*, 48 N. W. Rep., 232; and we submit

that this Court should, in accordance with its well-settled practice of applying the law of the State from which the case comes, apply the same rule in the present case as would be applied in the Supreme Court of the State.

THE AUTHORITIES everywhere are the same.

Flint vs. County Commissioners, 27 Fed. Rep., 850, was an action by a holder of tax certificates to recover the purchase money on failure of tax title, the land not having been liable to taxation at the time of the sale. The defendants demurred.

BREWER, J., giving the opinion, says :

"The demurrer must be sustained. The defendant is under no obligation to return taxes upon failure of tax titles, except as some statute requires it."

Judge COOLEY says :

"The tax purchaser buys, therefore, under the operation of the rule *caveat emptor*, and under common law rules would get nothing unless he got the land itself ; but undoubtedly he has an equity in the event of his title failing, to be reimbursed for his expenditure, and this the *legislature* in a number of the States has deemed it proper to make provision for."

Cooley on Taxation, 2d Ed., p. 476.

See also the note to page 476, where the author says : "A tax purchaser comes strictly within the rule of *caveat emptor*."

Again, the same learned author says :

"The rule *caveat emptor* applies to the purchaser. He takes all the risks of his purchase, and if he finds

in any case that he has secured neither the title he bid for nor any equitable claim against the owner, the State may, if it see fit, make reparation itself."

Cooley on Taxation, 2d Ed., p. 553.

In his work on taxation Mr. Desty says:

"The rule of *caveat emptor* applies to purchasers at a tax sale. * * * Except as limited and qualified by express statutory provisions, the rule applies to all purchasers at tax sales; and if the public has nothing to sell the purchaser gets nothing. * * * A county does not guarantee tax titles except as the statute may provide, and cannot refund money upon the failure of such titles."

2 Desty on Taxation, p. 850.

In the well-known case of *Lynde vs. (Town of) Melrose*, 10 Allen (Mass.), 49, one of the plaintiffs had purchased a tax title at a sale by a collector of taxes in the defendant town, and sold it to the other. The owner of the land having recovered it by writ of entry, the two plaintiffs joined in a suit against the town to recover the amount of purchase money paid by them to the collector, and the costs and expenses of the writ of entry action.

HOAR, J., giving the opinion of the Court, says:

"No precedent for maintaining such a suit is found; and the plaintiff's counsel rests his arguments solely upon the ground that the defendants have received the amount of the tax without consideration. If this be true, it is not easy to see how the plaintiffs get a joint right of action; nor how the defendants could be responsible for more than the sum of $1.39, the amount of tax which would go to the town treasury. But there is a plain distinction between the right of a person to recover from the town the amount of

a tax unlawfully assessed upon him, and the claim of a purchaser under a collector's deed, whose title proves defective. The town is not a party to the deed. The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed that the town has. He buys a title without warranty, except such covenants as he takes from the collector ; and he must rely only upon them. Beyond those covenants his deed is in the nature of a mere quitclaim for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive ; but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a losing one. Where there is no fraud or imposition, the sale of land without warranty creates no obligation to return the purchase money in any event."

FURTHER, there is no hardship in this rule of law. On the contrary, there would be hardship if the rule had been settled the other way. The purchase of a tax title has always been regarded as a *speculative purchase*. The purchaser buys at a venture. If he succeeds in getting a good title to the property, he gets it for a mere song. If he fails, he loses comparatively little. He pays his money for as was said by the learned Judge in *Lynde vs. Melrose*, *supra*, "FOR WHAT THE CHANCE IS WORTH," and it is no hardship upon him if the chance turns out to be worth nothing.

In *Logansport vs. Humphrey*, 84 Ind., 467, the Court say (p. 469) :

"We are of opinion that the action cannot, consistently with settled legal principles, be upheld.

The general rule is beyond dispute that the purchaser at a tax sale assumes all risk, and except as he

may be vested by force of statutory provision with the lien which the State or municipality held against the property of the delinquent tax debtor, he is without remedy if he fails to obtain a good title under his purchase. The doctrine of *caveat emptor* applies to such sales in its fullest force. *Cooley Taxation*, 572; *Lynde vs. Inhabitants of Melrose*, 10 Allen, 49; *Packard vs. New Limerick*, 34 Maine, 266; *Hamilton vs. Valiant*, 30 Md., 139."

Comrs. of Lyon County vs. Goddard, 22 Kans., 389, is a case in point.

Chief-Justice HORTON, giving opinion, says (p. 398):

"Counsel for defendant in error seems to contend that, independent of the statute, the money paid on the tax certificates may be recovered back. The decisions in New York, Wisconsin, and perhaps some other states support this doctrine.* We think the better rule the other way. A purchaser at a tax sale is a mere volunteer in the payment of the tax. Buying as he does property from a person who is not the owner, such party comes strictly and rigidly within the rule of "*caveat emptor*." He has the same means of knowing whether the proceedings relating to the assessment of the taxes, the tax sale, and the issuance of the certificate are valid or not, as the county has, and he is bound to inquire whether the officers have any authority to make the sale. As all the proceedings are matters of record, it is not only prudent for such a purchaser to examine into the matter for his own safety, but if he fails to inform himself of the authority of the officers he does so at his own risk, excepting that he may have his money refunded where the statute expressly makes such provision, if he pursues the remedy pointed out. The officers of a county can only act in accordance with positive law; and neither the Board of Commissioners nor the County Treasurer can refund any moneys upon the

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* NOTE.—That is not the law in New York, see *Coffin vs. Brooklyn*, 116 N. Y., 159, *supra*. That it is not the law in Wisconsin independently of the statute which exists in that State, see *Hyde vs. Supervisors*, 43 Wis., 129, *supra*.

failure of tax titles except as some statute requires it " (citing cases).

In *Hyde vs. Supervisors*, 43 Wisc., 129, there was an express contract by the Supervisors that, if for certain reasons mentioned, the title proved defective they would refund the money paid by the purchaser of a certificate at a tax sale. The Court held that this was in excess of their authority and void. *A fortiori* there could be no recovery without an authorized valid contract or a statute. Wisconsin had a statute authorizing recovery in certain cases. But the above case did not fall within the terms of the statute, and it was held there could be no recovery.

See also *per* BREWER, J., in *Sullivan vs. Davis*, 29 Kansas, 28, 32.

Waples vs. United States, 110 U. S., 630.
Packard vs. New Limerick, 34 Me., 266.
Barber vs. Evans, 27 Minn., 92, 94.
Rice vs. Atty.-Gen., 30 Mich., 12.
Hamilton vs. Valiant, 30 Md., 139.

At common law, therefore, and independently of statute, the plaintiffs have no right of recovery in the present case. We proceed to show that there is no statutory remedy, and that the statute of Dakota does not apply to the present case.

II.

The statute under which the appellees claim does not authorize a recovery in the present case.

The statute under which the appellees claim is as follows:

"When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest, to which he would have been entitled had the land been rightfully sold, *and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer.*"

Dakota Political Code, Sec. 78, Ch. 28 (Levisee, 2d Ed., p. 483).

The first part of the statute makes the county liable "when by mistake or wrongful act of the *treasurer*, land has been sold;" the last part of the statute imposing a *personal liability* to the purchaser directly *upon the treasurer*. The statute further provides that in case the recovery is first had against the county, the county shall have a remedy over against the treasurer and his sureties. In any event, therefore, the liability is to fall wholly and exclusively upon the treasurer. But such personal liability of the treasurer could be appropriate only in case the treasurer was himself at fault in selling the land. For this reason the statute creates the liability only for "the mistake or wrongful act of the *treasurer*." The liability of the county exists only for the mistake or wrongful act of the *treasurer*, and not for that of any other officer; for the treasurer is made liable whenever the county is made liable, and clearly the treasurer is not liable except for his own mistake or wrongful act. Could anything be clearer than this?

In the present case the mistake or wrongful act, if any, was not that of the treasurer, but of the assessor.

Dakota Political Code, 1877, Chap. 28, contains the provisions in regard to the assessment, levy and collection of taxes. In that chapter it is in substance provided, that *the assessor shall, as to every tract of land within the limits of his district, decide and determine whether it shall be placed upon or omitted from the assessment roll.* The lands in question were assessed and a list of the taxes handed to the treasurer for collection, which list was by statute expressly made "*full and sufficient authority*" for the treasurer. The treasurer had no alternative but to collect the taxes on the list committed to him, and to sell the lands on which the taxes were not paid. The statute is as follows:

"An entry is required to be made upon the tax list and its duplicate, showing what it is and for what county and year it is; and the County Commissioners shall attach to the lists their warrants under their hand and official seal in general terms, *requiring the treasurer to collect the taxes* therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The County Clerk shall take the receipt of the County Treasurer on delivering to him the duplicate tax list with the warrant of the County Commissioners attached, and *such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained.*"

Complied Laws of Dakota, § 1596; Political Code, Sec. 40, Ch. 28.

There is no pretense that the treasurer failed in the performance of any of his duties; but the whole failure, if any, was the mistake or wrongful act of the assessor or of other officers who furnished the list referred to in the above statute. The fact that the survey costs had not been paid (the circumstance which made the lands non-taxable) was an extrinsic fact—outside of any record

—and the treasurer was not bound to know it. He had full authority from the statute and the tax list.

See on the point that it was not the mistake of the treasurer,

Buck vs. Colbath, 3 Wall., 334.

If the theory of appellees were correct, then this action might have been brought directly against the treasurer of the county, and plaintiff might have recovered from him the large sum for which judgment was rendered against the county, including the highly penal rate of 30% interest, and all this while the treasurer had only performed his duty under the express requirement and authority of law, and was in no way responsible for the mistake or wrongful act, if any, in assessing the lands for taxation.

Further than this, if the appellees should succeed in this appeal the county can, by the like reason of the statute, recover the amount of the judgment herein against the treasurer.

See, further, on this point, the able discussion by the Supreme Court of the State of North Dakota in its opinion in *Tyler vs. Cass County*, 48 N. W. Rep., 232, 235. That case is an adjudication by the highest court of the State of North Dakota, construing the statute in question in a case where the facts are precisely the same (so far as the question of law is concerned) as they are in the present case. This construction of a statute by the courts of the State is conclusive and binding upon this court, as has repeatedly been decided. See the late cases of *Gormley vs. Clark*, 134 N. S., 338; *Cook Co. vs. Calumet & C. C.*, 138 U. S., 651.

III.

In any event there can be no recovery as to the subsequent taxes which were paid by the plaintiff Wallace.

The complaint alleges (Record, p. 4, Subdivision VII.) that the plaintiff Wallace, in order to protect his tax lien, paid to the defendant's treasurer the taxes for the year 1881 on the property which he purchased at the tax sale referred to as "subsequent taxes." Both the conclusion of law and the judgment of the Court included these subsequent taxes (Record, pp. 34, 35). That the plaintiff had, in any event, no right to recover the moneys paid for these subsequent taxes seems perfectly clear. The *statute* of Dakota does not purport to give a remedy in such a case. In this respect it differs from the statutes in some of the other States, for example, Wisconsin, where the statute expressly provides for a recovery of subsequent taxes in addition to the purchase money. But there is no such statutory provision in Dakota, Neither is there any principle of *common law* upon which an action can be maintained to recover such subsequent taxes. The conditions which are necessary in order that a tax which has been paid may be recovered are stated in Cooley on Taxation (2d Edition), page 805. He says :

"1. The tax must have been illegal and void ; 2. It must have been paid under compulsion or the legal equivalent ; 3. It must have been paid over by the collecting officer and have been received to the use of the municipality."

—and the treasurer was not bound to know it. He had full authority from the statute and the tax list.

See on the point that it was not the mistake of the treasurer,

Buck vs. Colbath, 3 Wall., 334.

If the theory of appellees were correct, then this action might have been brought directly against the treasurer of the county, and plaintiff might have recovered from him the large sum for which judgment was rendered against the county, including the highly penal rate of 30% interest, and all this while the treasurer had only performed his duty under the express requirement and authority of law, and was in no way responsible for the mistake or wrongful act, if any, in assessing the lands for taxation.

Further than this, if the appellees should succeed in this appeal the county can, by the like reason of the statute, recover the amount of the judgment herein against the treasurer.

See, further, on this point, the able discussion by the Supreme Court of the State of North Dakota in its opinion in *Tyler vs. Cass County*, 48 N. W. Rep., 232, 235. That case is an adjudication by the highest court of the State of North Dakota, construing the statute in question in a case where the facts are precisely the same (so far as the question of law is concerned) as they are in the present case. This construction of a statute by the courts of the State is conclusive and binding upon this court, as has repeatedly been decided. See the late cases of *Gormley vs. Clark*, 134 N. S., 338; *Cook Co. vs. Calumet & C. C.*, 138 U. S., 651.

III.

In any event there can be no recovery as to the subsequent taxes which were paid by the plaintiff Wallace.

The complaint alleges (Record, p. 4, Subdivision VII.) that the plaintiff Wallace, in order to protect his tax lien, paid to the defendant's treasurer the taxes for the year 1881 on the property which he purchased at the tax sale referred to as "subsequent taxes." Both the conclusion of law and the judgment of the Court included these subsequent taxes (Record, pp. 34, 35). That the plaintiff had, in any event, no right to recover the moneys paid for these subsequent taxes seems perfectly clear. The *statute* of Dakota does not purport to give a remedy in such a case. In this respect it differs from the statutes in some of the other States, for example, Wisconsin, where the statute expressly provides for a recovery of subsequent taxes in addition to the purchase money. But there is no such statutory provision in Dakota, Neither is there any principle of *common law* upon which an action can be maintained to recover such subsequent taxes. The conditions which are necessary in order that a tax which has been paid may be recovered are stated in Cooley on Taxation (2d Edition), page 805. He says :

"1. The tax must have been illegal and void ; 2. It must have been paid under compulsion or the legal equivalent ; 3. It must have been paid over by the collecting officer and have been received to the use of the municipality."

So, also, Desty states the law as follows :

" To support an action for money had and received against a municipal corporation to recover taxes illegally assessed and collected, two facts must occur : 1. A want of authority ; and 2. A payment under compulsion or duress."

2 Desty on Taxation, p. 788.

These conditions do not exist in the present case. The tax was not paid under compulsion, nor was there any legal equivalent, such as distress or forcible levy and execution or threat of the same.

That a tax voluntarily paid cannot be recovered back has been expressly decided by this Court in the case of *Union Pacific Railroad Co. vs. Commissioners of Dodge County*, 98 U. S., 541. In that case the taxes were paid on lands which were not taxable for the very same reason that the lands in question in the present case were not taxable, namely, that the costs of surveying had not been paid by the Railroad Company to the United States, and it was there held that the taxes which the company had paid voluntarily could not be recovered back.

In any event, therefore, the plaintiffs are not entitled to recover the subsequent taxes for which, among other things, the judgment below was rendered, and for this reason also the judgment should be reversed.

IV.

In any event, the appellees have no remedy as to any but COUNTY taxes; and, as in the present record the county taxes are not separated from the other taxes, and there is no method of doing so, the appellees have no remedy as to any taxes.

The complaint in the present case alleges (Record, page 3, subdivision IV.) that the taxes in question for which the lands were sold were "territorial, county, town, school and other taxes;" and the Stipulation of Facts states (Record, page 29, top) that the taxes were as follows: "territorial tax, county tax, general school tax and district school tax." The conclusion of law of the Court, and the judgment rendered in accordance therewith (Record, pages 34 and 35) are, in respect of *all* the taxes for which the lands were sold, without discrimination between county taxes and other taxes. There are no findings as to the amount of the separate funds, territorial, county and school or otherwise; and the plaintiff can in no event be permitted to recover of the county for anything more than it received into its treasury for its own use. It does not appear from the findings whether the portion of the money received from the sale belonging to the territory and the schools and other purposes had been paid over or was remaining with the county treasurer when the action was brought. But the presumption is, that of the purchase money received from Wallace by the county treasurer the

county treasurer paid over to the territorial treasurer and to the collectors of the various districts, towns, cities or localities all the money except that which he received for county taxes. Section 83 of the Dakota Political Code requires the treasurers of the counties to pay over funds in their hands on the first Monday of March and the first Monday of September of every year, and at such other times as the territorial treasurer shall require. Section 84 prescribes a penalty for failure so to do. Section 60 of Chapter 28 of the Dakota Political Code provides that the district, town, city or locality tax which the collector is not able to collect from personal property may be added to the territorial and county tax, and the sale which is made by the treasurer may be made for the amount of all these taxes, and that in such case the treasurer shall credit the proper district, town, city or locality for the taxes so collected, which shall be subject to the order of the proper collecting officer. It is presumed, therefore, that, in accordance with these provisions of the statutes of Dakota, the treasurer has paid over all the funds received as purchase money at the tax sales, except the county funds, and no longer has them in his possession. Therefore the action for money had and received will not lie in respect of those moneys.

The action for money had and received proceeds upon the theory that the *county has in its possession* money belonging to plaintiff which it wrongfully withholds. But, as to all but county money the treasurer is the agent of other political bodies, and not the agent of the county. The Dakota statutes nowhere make the county the receiver or

depositary of the purchase money at tax sales; the treasurer is everywhere named as such depositary. The treasurer, in performing the statutory duties imposed upon him of collecting the moneys belong to the Territory, municipal corporations, schools, &c., he is the agent of the Territory, &c., and the county ought no more to be bound by or responsible for his actions in such cases than as though some other officer not of the county was named in the statute to perform such duties. The duties so imposed upon the County Treasurer are not for the benefit of the county, but for the benefit of the Territory or local departments of the Territory, performed by the County Treasurer *ex officio* and to that extent he is the agent not of the county but of the Territory or other political body.

In *Bredin vs. Road Com.*, 87 Pa. St., 443, the County Commissioners refused to refund to the purchaser more than the amount of the *county* tax received from the sale, and thereupon the purchaser brought suit against the towns to which the proportion had been paid over by the County Treasurer. The town insisted that there was no privity between it and the purchaser, and that the action should be against the county, but the Court held the action well brought and says:

"By the terms of the Act of 1856, the rule CAVEAT EMPTOR does not apply to purchasers at treasurers' sales, where the lands sold are not in the county, or when sold upon a double assessment. It is obvious that the act intends the purchaser shall not lose his money. The county, however, cannot retain money paid into its treasury for the townships. The township taxes collected by the sale of lands, seated or unseated, are collected for the townships, and the county officers

are but agents for that purpose. These officers collect the township taxes for the townships just as they collect the county taxes for the county, and when the former are paid into the treasury they are paid in for the townships and not for the county. It follows that there can be no liability resting upon the county for moneys paid upon improper township assessments."

That the county is not liable at common law, as for money had and received, for any money, except that which came into its possession and is held by it to the use of the appellees, is too plain for argument. The authorities are uniform that, in such a case, there can be no recovery for any but the county taxes, and if these are incapable of separation from the other taxes, or if they are not separated in the trial and record of the case, then there can be no recovery at all. In *Otoe County vs. Gray*, 10 Nebraska, 565, the Court say :

"We are of the opinion that this allegation shows nothing more than that the money in question was paid into the hands of the county treasurer just as money paid at tax sales usually is, to be credited by him to the various funds for which taxes were levied for that year, as is required by Section 44 of the Revenue Act, and to be properly accounted for in his settlement with the county commissioners. And, in the absence of any averment on the subject, the only legitimate inference is that the sum so paid to the treasurer was the aggregate amount of all the various items required to be levied annually for State, county, school and road purposes, of which probably less than a moiety would, in any event, belong to or go to the county, or be subject to the control of its Board of Commissioners. For instance, the County Treasurer is required to pay the portion levied for all State purposes over to the State Treasurer, and that levied by the direction of the several school districts over to the treasurers thereof respectively.

"From this it must be seen that, even conceding the application of this money according to the statutory rule, the county has taken but a portion thereof, the amount of which is unknown to us, and unascertainable from anything contained in the record. This being so, it would certainly be exceedingly unjust to require the county to make good the whole sum paid to the treasurer, and in the absence of a statute so directing, there is no rule by which it can be done."

The same rule of law was stated in *Lynde vs. Melrose*, 10 Allen, 49, a case referred to at length under Point I., *supra*. The same rule was also applied in *City of Rochester vs. Town of Rush*, 80 N. Y., 302. In that case, the Court say, page 310:

"The case states 'that the plaintiff paid the amount of the tax to the Collector, who held a warrant for its enforcement, and it was by him paid over to the treasurer of the County of Monroe, who paid fifty-five dollars thereof to the authorities of the Town of Rush in payment of the expenses of said town, and a portion of the balance to the proper officers of the State, and retained and used the residue for county purposes according to law in the same manner as other taxes collected and assessed in said town.' *Upon the assumption that the town may be liable for money had and received, the recovery could not exceed the above sum of fifty-five dollars*, but although the names of office of the persons to whom that was paid are not given, we know that it could legally have been paid only to the supervisor, commissioner of highways or overseers of the poor. They do not represent the the town. Their functions are prescribed by statute, and the money they receive is to be expended in the performance of official duty."

That the County is liable only to extent of tax actually received. See,

Noyes vs. Haverhill, 11 Cush., 338.
Look vs. Industry, 51 Me., 375.

Where a town collector collects State, county and town taxes levied on property not taxable, the recovery

are but agents for that purpose. These officers collect the township taxes for the townships just as they collect the county taxes for the county, and when the former are paid into the treasury they are paid in for the townships and not for the county. It follows that there can be no liability resting upon the county for moneys paid upon improper township assessments."

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against the town will be limited to what is paid over to its use and will not include State or county taxes.

Railroad Co. vs. Burlington, 28 Vt., 193.
Slack vs. Norwich, 35 Vt., 818.
Spear vs. Braintree, 24 Vt., 414.
Mathiesen vs. Mazomanie, 20 Wis., 191.

That taxes cannot be recovered from a county after they have been disbursed. See,

Dickey vs. Polk Co., 12 N. W. Rep. (Iowa) 292.
Davenport M. & N. R. R. Co. vs. Lowry, 51 Iowa, 486.

In any event the county ought not to be held liable in a greater amount than the amount of the county taxes together with the amount of territorial or local taxes *remaining in the hands of the county treasurer and not paid over at the time the suit was brought.*

Further, to show that at least in respect of all but county taxes there is no liability of the county to the purchaser at the tax sale, the certificate of sale and the tax deed are not for or on behalf of the county, and in no way are they the contract of, nor in any way do they purport to bind the county, but the Territory is made the contracting party. The granting part of the deed commences as follows: Now, therefore, this indenture made this day of , 18 , between the Territory of Dakota, by A. B., the treasurer of said county, of the first part, &c., , and of the second part, &c."

Sec. 74, Chap. 28, Pol. Code, 1887.

The county is not only not mentioned in the sale and conveyance of real property for delinquent taxes, but the deed of the purchaser expressly recites the

capacity in which the county treasurer acts in making the sale, and names the Territory as grantor of the estate purchased by the party of the second part.

For these reasons, therefore, the appellees have in any event no right of recovery except in respect of *county* taxes; and as those are not separated from the other taxes, they have no right of recovery whatever.

V.

For these reasons the judgment should be reversed, and directions given either to dismiss the complaint or to grant a new trial.

JOHN F. DILLON,
HARRY HUBBARD,
For the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. 1076.

STUTSMAN COUNTY,

Appellant,

vs.

CHARLES S. WALLACE et al.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR APPELLANT

ON

APPELLEES' MOTION TO DISMISS THE APPEAL WITH MOTION TO AFFIRM THE JUDGMENT.

JOHN F. DILLON,

Of Counsel for Appellant.

C. G. Burgoyne's Printing Business, 146 Centre Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1076.

STUTSMAN COUNTY,
Appellant,

AGAINST

CHARLES S. WALLACE ET AL.

Brief on Appellees' Motion to Dismiss the Appeal with Motion to Affirm the Judgment, by John F. Dillon, of Counsel for Appellant.

Statement of the Case.

The plaintiffs below, who are the appellees in this Court, brought this action in the District Court of the Territory of Dakota, September 28, 1886 (Record, p. 1), to recover from Stutsman County certain money which plaintiffs alleged they had paid said county for certain lands which the treasurer of said county had assumed to sell to plaintiffs, which sale plaintiffs alleged was invalid. The plaintiffs also sought in this action to recover the amount of taxes paid by them on said lands after such purported sale to them.

The action was tried by the District Court for Stutsman County on a stipulation of facts made by the parties thereto (Record, pp. 27–33). On the facts as stipulated the District Court found as a conclusion of

law that the plaintiffs were entitled to recover (Record, p. 34), and gave judgment accordingly (Record, p. 35).

The defendant below had moved for judgment in its favor (Record, p. 33). Defendant also moved for a new trial, which was refused (Record, p. 37). The defendant duly excepted to the orders and decisions of the District Court and these exceptions were allowed by that Court (Record, p. 36). The judgment roll of the District Court was certified by the Judge of that Court (Record, p. 38), and a copy of said judgment roll, also of the Judge's certificate and of the notice of appeal (Record, p. 1), were certified by the Clerk of said District Court, and with such Clerk's certificate were transmitted and filed with the Supreme Court of Dakota (Record, p. 39).

The Supreme Court of Dakota heard the appeal, and rendered judgment affirming the judgment of the District Court (Record, pp. 40–41). The defendant petitioned the Supreme Court of Dakota for a rehearing (Record, pp. 42, 43), which was refused (Record, pp. 44, 45). Thereupon the defendant petitioned the Supreme Court of Dakota for the allowance of this appeal to this Court, and its petition was granted (Record, p. 45). The appellant perfected its appeal to this Court in proper form; appeal bond was given (Record, p. 48); citation was issued by the Chief-Justice of the Supreme Court of Dakota to the appellees (Record, p. 49), and the record of this case in the Supreme Court of Dakota was certified by the Clerk of that Court (Record, p. 50); and assignment of errors by appellant was duly made (Record, p. 51). On suggestion of a diminution of the record of the Supreme Court of Dakota (by the omission of the entry of the remittitur to the

District Court and of the opinion giving the reasons for the refusal of a rehearing as above mentioned), a writ of *certiorari* was issued by this Court to bring up the omitted parts of the record (Record, p. 53), to which writ a return has been duly made (Record, pp. 53, 54).

ARGUMENT.

I.

The appeal is properly before this Court, and there is no ground for a motion to dismiss it.

Appeal, and not writ of error, is the proper means to bring this case before this Court, for the trial was not by a jury.

> Act of Congress, April 7, 1874, ch. 80, sec. 20 (18 St. at Large, 27).

The only reason which appellees urge in support of this motion to dismiss the appeal is their suggestion that the transcript of the record now on file in this Court is not properly certified. It requires but a short statement to show that there is no basis for this suggestion or this motion.

This in an appeal from a final judgment of the Supreme Court of Dakota (Record, pp. 40, 45), and the record now on file in this Court is the record of the Supreme Court of Dakota, duly certified by the Clerk of that Court (Record, p. 50).

This is the regular practice, and is an exact compliance with the rules of this Court (Rule VIII., §§ 1, 2): "*The clerk of the court by which such judgment or decree was rendered,*" is the language used in that rule.

But the appellees object that the Supreme Court of Dakota did not have the record in its possession at the time when it was certified by the Clerk of that Court; that the record had been transmitted to the District Court, and was in the possession of the latter Court at that time; and hence, that the record to be filed in this Court should have been certified by the Clerk of the *District* Court.

The argument of appellees proceeds upon a misconception: (1) of the nature of the record of a case in general as the case goes from a lower to a higher tribunal, and as the decision of the higher tribunal is sent back to the lower tribunal for enforcement; (2) upon a misconception of the facts in this particular case as affecting the decision of this motion; and (3) the general practice of this Court in requiring the certification of records and the reasons therefor.

The argument of appellees assumes that there is but one record of a case, no matter through how many stages of appeal the case may have passed. The fact is each Court keeps its own record. There is one record in the Court of original jurisdiction, and another in the appellate Court. It is true, the latter record may be made up, partly by the former, but it is none the less another, and to a certain extent a different, record. For it necessarily has, besides the record of the Court below, the proceedings necessary to perfect the appeal or other method of bringing the case before the Appellate Court, and in addition thereto, its own

decision or judgment in the cause. On this point, that the records are not the same, I need only add a short quotation from the opinion of Chief-Justice WAITE, in *Atherton vs. Fowler*, 91 U. S., 143, 149, as follows:

"The transcript is without doubt a copy of the proceedings in the Court below, but that does not make the record below the record above. The Court above acts only upon the transcript, and from that its record is made."

The record of the Court below is usually brought into, and made a part of the record in the appellate Court by having a certified copy or transcript of the record below (and not the original of that record), transmitted to the appellate Court.

Now, it appears that in the present case what was sent by the District Court to the Supreme Court of Dakota, was a certified *transcript or copy*, of the record of the District Court, and not the original record of the latter Court (Record, p. 39). This practice was required previous to the Act of Dakota of March 11, 1887 (1 Dakota Codes, Levisee, 119, § 408); and was allowed after that act was passed (Compiled Laws of Dakota, 1887, § 5217). From that transcript in part the Supreme Court of Dakota made up its record.

This transcript or copy was no doubt retained by the Supreme Court of Dakota. There could have been no necessity for sending this copy back to the District Court, for the original had remained in that Court. But whether the particular transcript which was sent from the District Court was returned to that Court, or was kept in the Supreme Court of Dakota, is immaterial. Some copy of it, at least, was kept in

the Supreme Court; and, a copy of it, with the rest of the record in the latter Court, has been duly certified to this Court as the record of the latter Court in this case.

It is urged by the appellees that in the remittitur from the Supreme Court of Dakota to the District Court, the former Court must have sent back the record in this case; and that, for that reason, it had no record of its own in this case, which it could certify to this Court. This argument is based on a section of the Dakota Code (Compiled Laws, § 5238; Act of Dakota, March 11, 1887, Ch. 20, § 25), and upon a misinterpretation of the purpose and requirement of that section. Formerly, the Dakota Code required *certified copies* of the record below, to be sent to the appellate Court (1 Dakota Codes, (Levisee) p. 119, § 408), and there was no provision for returning such copies to the lower Court. Such return was unnecessary, because the original record of the lower Court was always on file in that Court. When, however, a provision was made, which allowed the *original* record of the lower Court to be transmitted to the Supreme Court, then it became necessary or expedient to make some provision for returning the *original* record of the lower Court to that Court. But there is no reason or propriety in applying this requirement to *copies* of papers which are sent from the lower Court. The statute does not make such requirement. The section which provides for the transmission of the record from the lower Court to the Supreme Court provides that either "*original papers*" or certified copies shall be transmitted (Compiled Laws of Dakota, § 5217). The section which provides for the remittitur, provides that "the Clerk of the

Supreme Court shall remit to such Court *the papers* transmitted to the Supreme Court" (Compiled Laws of Dakota, § 5238). There is no provision for returning *copies* of papers, if copies have been sent instead of originals; and there is no necessity or propriety for the return of such copies; for the lower Court, in case copies have been sent, retains the originals, and has no need of the copies.

But suppose the statute did require a return of certified copies, which had been sent instead of originals—there is nothing to prevent the Supreme Court from making and retaining a copy of the record of the lower court as a part of its own record. The Supreme Court has the right to regulate its practice and proceedings by general rules not inconsistent with the organic act and statutes of the territory (Compiled Laws, § 4821). Certain it is that the Clerk of the Supreme Court of Dakota, when he certified the record in the present case, had something in his office to certify; and, as the contents of this record now on file in this Court show, that something was a complete record of the case in the Supreme Court of Dakota—the Court which pronounced the judgment from which this appeal is taken, and whose clerk is, by the rules of this Court, the proper person to certify such record. A copy of the record of the Supreme Court of the Territory, certified by the Clerk of another court, would be a strange and anomalous proceeding—a *rara avis*.

Appellee's argument shows a misconception of the purposes for which the Clerk's certificate is required by this Court, which is to assure this Court that it has before it the record on which the court whose judgment is appealed from pronounced that judgment. The Clerk

the Supreme Court; and, a copy of it, with the rest of the record in the latter Court, has been duly certified to this Court as the record of the latter Court in this case.

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Appellee's argument shows a misconception of the purposes for which the Clerk's certificate is required by this Court, which is to assure this Court that it has before it the record on which the court whose judgment is appealed from pronounced that judgment. The Clerk

of such Court is always a proper party to certify such record. If the record on inspection is insufficient or defective because part of it is not in such court, either for the reason that it has never been there, as in cases where the opinion of the appellate Court on a particular point only was called for by the Court below during the progress of the case in the lower court, or for the reason that a part of the record has been deposited in another court so that that part does not remain in the appellate Court—then and in such cases the proper proceeding is for this Court to send its process to the custodian of the record wherever it may be found. Even in such a case, a motion to dismiss is not the proper remedy.

Chief-Justice WAITE, in *Atherton vs. Fowler*, *supra*, said (p. 146):

"As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that Court, and through it, if necessary, upon the inferior tribunals. It is, perhaps, safe to say that *a writ will never be dismissed* for want of jurisdiction, because it is directed to the highest Court in which a decision was and could be had. We may not be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different Court before our objected can be accomplished; but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want."

So, also, in another case:

"The clerk certifies the transcript sent up to be 'a true, full and perfect copy from the record of all the proceedings in the suit.' Certainly this is sufficient for all the purposes of jurisdiction. If, in point of fact, the certificate is not true, the remedy is by *certiorari*, to supply deficiencies, and not by motion to dismiss."

Per WAITE, CH. J., in *M., K. & T. R. R. Co. vs. Dinsmore*, 108 U. S., 30, 31.

When, as in the present case, there is a complete record certified by the Clerk of the Court which rendered the judgment appealed from, then there is no reason or propriety in calling for any further record, and not the slightest ground for dismissiug the appeal..

This question has been passed upon in *Atherton vs. Fowler, supra,* and a conclusion reached which is decisive against the contention of the appellees in this case. Chief-Justice WAITE summarized this conclusion as follows (p. 148) :

" The rule may, therefore, be stated to be, that if the highest Court has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior Court for safe keeping, and no longer has them in his possession, *we may send our writ either to the highest Court* or to the inferior Court. If the highest Court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior Court, and send them to us, no writ need go to the inferior Court ; but if it fails to do this we may ourselves send direct to the Court having the record in its custody and under its control. So, too, if we know that the record is in the possession of the inferior Court, and not in the highest Court, we may send there without first calling upon the highest Court ; but if the law requires the highest Court to retain its own records, and they are not in practice sent down to the inferior Court, our writ can only go to the highest Court. That Court being the only custodian of its own records is alone authorized to certify them to us.

" *In this case our writ went to the Supreme Court, and in obedience to its command that Court has sent us its record. There is now no need of a further writ, even if the practice in California permitted the transmission of records from the Supreme Court to the inferior courts.* But such, as we understand, is not the practice. The Supreme Court is there the sole custodian of its own records. This transcript is retained in the Supreme Court, and is the foundation of the proceedings there. The transcript is without doubt a copy of the proceedings in the Court below ; but that does not make the

record below the record above. The Court above acts only upon the transcript, and from that its record is made."

The appellees make no complaint or suggestion that the record now on file is incomplete, or that it is not the record on which the Supreme Court of Dakota pronounced judgment. It is unnecessary, therefore, to consider whether the record now on file is the actual record of the case. But, even if the appellees' contention were correct, that a part of this record is not the legal record of the case, namely, that part which consists of the Record of the District Court, because the Supreme Court of Dakota did not have it in its possession at the time when it was certified, if that were correct, still we have here at least a part of the record of the case, that part which originated in the Supreme Court of Dakota, and of which it sent, if anything, only copies to the District Court, and that part at least is properly certified to this Court. So that, at the best for appellees, there is only an omission from the record of the case in this Court of that part of the record which came from the District Court. But such omission would be no cause for dismissing the appeal; the proper remedy would be to send process for the remainder of the record wherever it might be found.

Atherton vs. Fowler, *supra*, at p. 146.
M., K. & T. R. R. Co. vs. Dinsmore, *supra*.

II.

There is no ground for a motion to affirm.

This case is clearly within the appellate jurisdiction of this Court.

Rev. Stat. U. S., 1878, § 702.
Act of Congress, March 3, 1885 (Stat. of 2d. Sess., 48th Cong., Ch. 355).

There is no color of right for the motion to dismiss (*Supra*, Point I.).

This being true, this Court will not entertain a motion to affirm.

New Orleans vs. Construction Co., 129 U. S., 45.
Gay vs. Parpart, 101 U. S., 391.
School District vs. Hall, 106 U. S., 428.

III.

Whether a motion to dismiss be proper or not this case is not of a character to be disposed of on a motion to affirm.

It is not proposed here to go deeply into the merits of the case; it is believed the Court will not listen to an extended and exhaustive argument on a mere motion. In order for appellees to succeed on this motion it must appear that there is no reasonable ground for this appeal, and this fact must appear—not after an extended argument and consideration such as might be

given at a regular hearing of the case—but upon a short examination of the case, such only as can properly be given on a motion of this kind. Such motion having been made, I deem it proper to state that in my judgment there are important questions presented by this appeal, questions that deserve serious consideration by this Court upon a hearing of this cause at a proper time, in a proper manner, and upon a careful presentation by counsel of the arguments and authorities. This is not the time nor manner for such presentation. I propose, therefore, only to state in a brief way some of the questions which are involved in the case, from which it will readily appear that this is not a case for affirming the judgment upon a motion and without further consideration than can be given at this time.

Sometimes this Court has affirmed cases on motion when it clearly and readily appeared that they were on all fours with cases already decided, so that there was no need for an extended consideration. It cannot be pretended that this case falls within that class of cases. No case like this has ever been decided by this Court, nor, it is believed, by any other Court except this very case in those Courts from which this appeal is prosecuted. Certainly the appellees fail to state any decisions of this Court or of the Courts of Dakota in other cases on the questions now involved.

The case is *res nova*.

Therefore, the cases of *Swope vs. Leffingwell*, 105 U. S., 3; *McKee vs. Rains*, 10 Wall., 22, and *Sweeny vs. Lomme*, 22 Wall., 208, cited by counsel for appellees (Brief, pp. 13, 14), have no application.

In the absence of settled judicial decisions in this

Court or the Dakota Courts on the questions involved, it is submitted that decisions of Courts of different and independent jurisdictions, even if such decisions existed, furnish no reason for asking this Court to refuse to hear this case upon its merits.

But there are no such decisions of other Courts upon the questions involved in this case. Counsel for appellees refers to a Nebraska statute and decisions thereunder (Brief, p. 15), but that statute, as will readily appear, differs in a very important respect from the statute which must be considered in the present case. The Nebraska statute reads "mistake or wrongful act of the treasurer, *or other person*"; the Dakota statute reads "mistake or wrongful act of the *treasurer*" only. The importance of this difference is briefly stated below.

With this preface, I propose to state briefly some of the questions involved in this case.

It is clear that the appellees have no remedy except by statute, and only if their case is within the terms of the statute. It is unnecesary to multiply authorities in support of this well known rule of law.

See Cooley on Taxation, 2d Ed., pp. 476, 553.
2 Desty on Taxation, p. 850.
Lynde vs. Melrose, 10 Allen, 49.

There is no statute authorizing a recovery in the present case.

The statute under which the appellees claim is as follows:

"When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest, to which he would have been entitled had the land been rightfully sold, *and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer.*"

Dakota Political Code, Sec. 78, Ch. 28 (Levisee, 2d Ed., p. 483).

The italicized portion of the statute is omitted (with apparent care) from the quotation of it by the counsel for the appellees (Brief, p. 14).

The first part of the statute makes the county liable "when by mistake or wrongful act of the *treasurer*, land has been sold"; the last part of the statute imposes a *personal liability* to the purchaser directly *upon the treasurer*. The statute further provides that in case the recovery is first had against the county, the county shall have a remedy over against the treasurer and his sureties. In any event, therefore, the liability is to fall wholly and exclusively upon the treasurer. But such personal liability of the treasurer could be appropriate only in case the treasurer was himself at fault in selling the land. For this reason the statute creates the liability only for "the mistake or wrongful act of the *treasurer*." The liability of the county exists only for the mistake or wrongful act of the *treasurer*, and not for that of any other officer; for the treasurer is made liable whenever the county is made liable, and clearly the treasurer is not liable except for

his own mistake or wrongful act. Could anything be clearer than this?

In the present case the mistake or wrongful act, if any, was not that of the treasurer, but of the assessor. The lands were assessed and a list of the taxes handed to the treasurer for collection, which list was by statute expressly made "*full and sufficient authority*" for the treasurer. The treasurer had no alternative but to collect the taxes on the list committed to him, and to sell the lands on which the taxes were not paid. The statute is as follows:

"An entry is required to be made upon the tax list and its duplicate, showing what it is and for what county and year it is; and the County Commissioners shall attach to the lists their warrants under their hand and official seal in general terms, *requiring the treasurer to collect the taxes* therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The County Clerk shall take the receipt of the County Treasurer on delivering to him the duplicate tax list with the warrant of the County Commissioners attached, and *such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained.*"

Compiled Laws of Dakota, § 1596; Political Code, Sec. 40, Ch. 28.

There is no pretense that the treasurer failed in the performance of any of his duties; but the whole failure, if any, was the mistake or wrongful act of the assessor or of other officers who furnished the list referred to in the above statute.

If the appellees' theory were correct, then this action might have been brought directly against the Treasurer of the county, and appellees might have recovered from him the large sum for which judgment was rendered

against the county, including the highly penal rate of 30% interest, and all this while the treasurer had only performed his duty under the express requirement and authority of law, and was in no way responsible for the mistake or wrongful act, if any, in assessing the lands for taxation.

Further than this, if the appellees should succeed in this appeal the county can by the like reason of the statute, recover the amount of the judgment herein against the treasurer.

Certain moneys for which judgment was rendered cannot in any event be recovered from the county in this or any other action.

The taxes in question were not merely county taxes, but territorial taxes, general school taxes and district school taxes (Stipulation of Facts, Record, p. 29). Only part of the taxes, therefore, went into the treasury of the county for its use; and only for such part can any statute authorize a recovery.

It cannot be objected in this connection that the county really got the benefit of all the taxes which were paid, including those for other than county purposes, on the ground that the county would, if those taxes had not been paid, have had to raise the money from the taxable property of the county. Such an argument would lose sight of the fact that if these lands had not been taxed the taxable property of the county would have been so much less and its *pro rata* of other than county taxes would have been so much less.

The Court below allowed thirty per cent. annual interest on the amounts claimed from the dates of the tax sales, October, 1882, and October, 1883, to the date of the judgment, April 13, 1887. Even if a recovery of the principal amounts claimed were justifiable, this interest allowance has no justification. Interest at the rate of thirty per cent. should have been allowed, at most, only for the time prescribed for redemption from tax sales, namely, for two years from the dates of such sales. After that time interest, if any, should have been at the rate of only seven per cent.

Finally, this appeal was taken in good faith, in the confident expectation of reversing the decision of the Court below. There is no attempt on the part of the appellants to delay proceedings in the case, nor any desire on their part to do so. They merely desire a full hearing by this Court of the case on its merits, and to such hearing they claim, as of right, to be entitled.

Appellants, therefore, pray that this motion may be denied.

JOHN F. DILLON,
Atty. for Appellant.

Oct. 25, '89.—50

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 89

CHARLES S. WALLACE, AND
JAMES M. MARTIN, as Assignee of
Daniel H. Wallace,
Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY,
Defendant and Appellant.

Respondent's Brief.

W. E. DODGE,
Attorney for Appellees

J. H. BALDWIN,
D. B. KURTZ, AND
JOHN S. WATSON,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. . . . . .

CHARLES S. WALLACE, AND JAMES M. MARTIN as Assignee of Daniel H. Wallace,

Plaintiffs and Respondents,

vs.

STUTSMAN COUNTY,

Defendant and Appellant.

BRIEF FOR RESPONDENTS.

STATEMENT OF CASE.

This is an appeal from a judgment of the supreme court of Dakota Territory, affirming in ever particular and by a unanimous bench, the final judgment of the district court of that territory for Stutsman county rendered on the 13th day of April, 1887, in favor of the respondents and against the appellant, for the sum of $35,800 together with costs and disburse-

ments, said amount being the consideration paid to said county for certain lands described in the complaint, sold by its treasurer to the respondent Wallace, at public tax sale in 1882 and 1883, the same being at the time public domain of the United States and not within the jurisdiction of the taxing power of said territory of Dakota, or lands which it, or its officers could lawfully tax or sell. Said county having refused either to convey the same in accordance with the conditions contained in its certificates of sale, or to refund the money thus paid, on demand made by respondents.

The facts were agreed to and the stipulation containing a statement thereof is contained in the record of this case. Briefly stated they are as follows:

The lands in question were a portion of the public domain granted by the congress of the United States to the Northern Pacific Railroad Company, by an act approved July 2nd, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line, from Lake Superior to Puget Sound on the Pacific coast, by the northern route."

13th United States Statutes at Large, pages 367 to 369.

Which Act as well as all subsequent Acts and joint resolutions of congress amendatory thereof, or affecting the same are made a part of the stipulated statement of facts. See Record, p. 27.

That prior to the year 1880, the government of the United States had expended large sums of money in surveying the lands included within the grant lying within the territory of Dakota, including the lands

described in the complaint, no part of which money had at the time of the assessment of taxes or sale of the lands for non-payment thereof as stated in the complaint, been paid by the Northern Pacific Railroad Company or any other party in interest, by reason whereof the government refused to convey said lands to said company and did not convey them, and that up to the date of such sales no patent whatever issued therefor.

That in the years 1880, 1881 and 1882 said lands were assessed for taxes for general purposes, by the officers of the appellant county and on the first day of October, 1882 and 1883, the treasurer of said county, sold and struck the same off to the respondent Charles S. Wallace, who purchased and paid for the same, the several amounts shown by the certificates described in the complaint, amounting in the aggregate, together with accrued interest, to $35,800.

That the district court of said county, prior to the commencement of this action in suits brought by the said Northern Pacific Railroad Company and against the defendant county's treasurer and the respondent Wallace adjudged all the tax proceedings mentioned in the complaint and stipulation of facts herein as affecting said lands to be null and void and perpetually enjoined the execution of deeds for any of said lands.

That prior to the commencement of this action the respondent Wallace, for a valuable consideration, assigned an interest in said certificates and in the money paid for said lands and subsequent taxes thereon, to the plaintiff James M. Martin as assignee for

Daniel H. Wallace; that none of said lands have been redeemed from said sale or subsequent taxes and that prior to the commencement of this action, the respondent tendered the defendant's board of county commissioners said certificates for cancellation and demanded the money paid as a consideration therefor and for subsequent taxes thereon, all of which the defendant refused to pay, and no part of which has ever been paid.

The statute law pertinent to the subject is as follows:

First. The grant of congress to the Northern Pacific Railroad Company, approved July 2nd, 1864.

13th U. S. Statutes at Large, pages 367 to 369.

Second. The act of congress reserving to the United States government the legal title to all lands so granted, as security for the payment of the costs of surveying them, approved July 15th, 1870, entitled "An Act making appropriations for sundry civil expenses of the government for the year ending June 30th, 1871, and for other purposes." The portion of which act relating to this matter is as follows:

> "And provided further, that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any acts incorporating or relating to said company, there shall first be paid into the treasury of the United States, the cost of surveying, selecting and conveying the same by said company or party in interest."

16th U. S. Statutes at Large, page 305, 306.

Third. The following portions of chapter 28, of the political code of the territory of Dakota, in force

at the time of the levy and assessment of the taxes and sale of the lands referred to in the complaint and at the date of the commencement of this action and subsequent thereto.

Sub-division 1, section 2, exempting certain property from taxation, to-wit:

> "The property of the United States and of this territory, including school lands."

Section 56 making taxes upon real a personal property a lien upon real estate.

> "Taxes upon real property are hereby made a perpetual lien thereupon against all persons and bodies corporate, except the United States and the territory, and taxes due from any person upon personal property shall be a lien upon real property owned by such person, or to which he may acquire a title."

Section 62 authorizing the sale of lands for delinquent taxes and defining and restricting the authority of the treasurer of the several counties in the territory to make such sales.

> "That on the first Monday of October in each year between the hours of nine o'clock A. M. and four o'clock P. M. the treasurer is directed to offer at public sale at the court house, or place of holding courts in his county, or at the treasurer's office, where by law, the taxes are made payable, all lands, town lots, or other real property, WHICH SHALL BE LIABLE for taxes of any description for the preceding year or years, and which shall remain due and unpaid, and he may adjourn the sale from day to day until all land, lots or other real property have been offered AND NO TAXABLE PROPERTY shall be exempt from levy or sale for taxes."

The words "WHICH SHALL BE LIABLE FOR TAXES OF ANY DESCRIPTION" were interpolat-

for the tract of land mentioned in said certificate, and which was the least quantity of the tract above described that would sell for the amount due thereon for taxes, costs and charges as above specified, and it appearing that said lands were legally liable for taxation, and had been duly assessed and properly charged on the tax book or duplicate for the year 18——and that said lands had been legally advertised for sale for taxes, and were sold on the——day of—— 18——

Now, therefore, this indenture, made this——day of——18—between the territory of Dakota, by C. D., the treasurer of said county, of the first part, and the said A. B. of the second part; witnesseth, that the said party of the first part, for and in consideration of the premises and the sum of one dollar in hand paid, hath granted, bargained and sold, and by these presents doth grant, bargain and sell and convey unto the said party of the second part heirs and assigns forever, in as full and ample manner as the said treasurer of said county is empowered by law to sell the same.

In testimony whereof, the said C. D., treasurer of said county of——has hereunto set his hand and seal on the day and year aforesaid.

Attest: ——————————[SEAL]

Section 78, which the district and supreme court of the territory of Dakota unanimously construed as entitling the respondents to a recovery in this action upon the facts:

"When, by mistake or wrongful act, of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer."

Section 84 of chapter 132 of the laws of North Dakota, providing for the repayment of money to purchasers at tax sales in all cases where any such sale has been or hereinafter shall he declared void:

"When a sale of land as provided in this act is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where any such sale has been or hereinafter shall be so declared void, or any certificate or deed issued under such sale shall be set aside or cancelled for any reason, or in case of mistake, or wrongful act of the treasurer or auditor, land has been sold upon which no tax was due at the time, the money paid by the purchaser at the sale, or by the assignee of the state upon taking the assignment and all subsequent taxes, penalties and costs paid by such purchaser or assignee, shall with interest at the rate of ten per cent. per annum from the date of such payment, be returned to the purchaser or assignee or party holding his right, out of the county treasury, and so much of said money as has been paid into the state treasury shall be charged to the state by the county auditor and deducted from the next money due the state on account of taxes. The county treasurer or auditor shall be liable on their bond for any loss occasioned by such wrongful act. Whenever any sale of land or certificate, or deed made or given under this act is declared void by judgment of court, unless the judgment declared the tax to be illegal, said tax and subsequent taxes, returned to the purchaser or assignee as provided in this section, shall remain a lien upon the land sold, and the county auditor shall advertise the same at the next succeeding annual sale, for the full amount of taxes, penalties and costs due on said piece or parcel of land."

Upon the law and the facts as hereinbefore stated with the exception of section 84 of chapter 132 of the laws of North Dakota of 1890. The district court of

Stutsman county rendered the following decision, which the supreme court of the Territory of Dakota unanimously and in all things affirmed, to-wit:

"That the lands described in the plaintiff's complaint and each and every part and parcel thereof, were at the date of the sales thereof mentioned and described in said stipulated statement by the treasurer of said Stutsman county, for delinquent taxes, lands upon which no tax was due, and that no tax of any description was due upon any portion of said lands at the time of the sales mentioned therein or either of them, or at any of the times mentioned in said complaint".

Second. "That said land and each and every parcel thereof, were sold as set forth in said statement of facts by the mistake and wrongful act of the defendant's treasurer, the then county treasurer of Stutsman county, and that the plaintiff's are entitled to recover from the defendant, the amount paid for said lands at said sales and the amount paid as subsequent taxes thereon, as hereinafter stated, together with thirty per cent interest thereon and on the whole amount so paid, from and after the dates of such payment as hereinafter specified, to this date."—Printed record, pp. 34.

ARGUMENT.

POINTS AND AUTHORITIES.

FIRST ASSIGNMENT OF ERROR, PAGE 51 PRINTED RECORD.

First. *The lands sold by the defendant's treasurer to the respondent Wallace had not become part of the taxable property, within the territory of Dakota at or prior to the date of such sale.*

The rule established by this court applicable to this class of lands, we understand to be this:

Under the provisions of the act of 1864, granting land to the Northern Pacific Railroad Company and subsequent to the enactment of the qualifying act of 1870, retaining in the general government the legal title to such lands until the costs of surveying etc., should be paid, said lands remained so far as the power to tax or sell the same by the territorial government was concerned, a part of the public domain, and so continued until all the pre-requisites prescribed by law for the acquisition of the title had been performed and nothing more remained to be done by the grantee, to entitle it to a patent from the government. It had been repeatedly decided by the court, prior to the time these sales were made, that such lands were not taxable, and the title to the lands embraced within the grant of the Northern Pacific road in the defendant county had never passed from the government to the grantee, or within the jurisdiction of the territorial government and

hence were not *prima facie* a part of the taxable property of the county.

Carroll v. *Stafford*, 3rd How. U. S. 509.
Witherspoon v. *Duncan*, 4th Wallace 210.
Frisbie v. *Whitney*, 9th Wallace 187.
R. R. Co. v. *McShane*, 22nd Wallace 444.
Shepley v. *Cowan*, 91st U. S. 330.
R. R. Co. v. *Prescott*, 16th Wallace 303.
R. R. Co., v. *Trail Co.* 115th U. S. 600.

It will be admitted that the status of the title to these lands, is identical with that in the case of *N. P. R. R. Co.* vs. *Trail Co.*, *supra*, and that if the rule of law announced in that case is to be adhered to by this court, the respondents' first proposition must be conceded.

II.

SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR, PRINTED RECORD, P. 51.

The lands sold by defendant's treasurer to respondent Wallace, for which the consideration paid by him is sought to be recovered back, were at all times, from the inception of said tax proceedings until their consummation by said tax sale, a part of the public domain and not within the jurisdiction of the taxing power of the territorial government. The entire tax proceedings as to them were null and void *ab initio*, the territory and its officers not having jurisdiction of the subject matter. They were not *prima facie* taxable by the territorial government. Originally all lands within the territory were public domain. The

territorial government was not a sovereign, but a subordinate to the sovereign. The sale of property for taxes is the highest exercise of sovereign power. Such power cannot be exercised by the subject over the sovereign. Such lands continued to be a part of the public domain, and as such, under the jurisdiction of the sovereign until title was relinquished and transferred by the sovereign to its grantees. This depended, under the grant of the Northern Pacific Railroad Company, upon the compliance on its part with all of the conditions of its grant, hence, whether or not title had passed and said lands had become taxable at any time was a question of fact, the taxability of such lands depending upon proof. They were not *prima facie* taxable, but were *prima facie* not taxable until such proof existed. See opinion of Justice Miller in *N. P. R. R. Co.* vs. *Trail County*, 115 U. S. 600, 610. Under the laws of the territory they were *prima facie* not taxable.

(Chapter 35, laws 1868, sec. 77 and 1646, compiled laws of Dakota.)

Neither the territory nor its officers could therefore, lawfully assume jurisdiction to tax or sell the same. The territorial government could neither lawfully authorize nor protect its officers in the performance of such acts. Proceedings to enforce the collection of taxes, which were by law made a lien upon such lands in Dakota, were proceedings against the lands to foreclose such lien and collect the charges due therefrom to the local government. These lands owed no charge to the local government. The de-

fendant's treasurer offered them for sale for taxes under a statute restricting his authority to sell lands to those subject to taxation and guaranteeing to the purchaser as to all of such lands as should remain unredeemed after two years, a deed of conveyance in the name of the territory which should vest in the purchaser an absolute estate in fee simple in such lands. There was nothing irregular, either in the record of such tax proceedings or of the title to the lands to act as constructive notice to the purchaser, that his title was defective, so as to render pertinent or applicable to such purchase, the rule of *caveat emptor*. The county treasurer received from the purchaser as the consideration for such purchase, money which neither he nor the defendant county had any color of right to either receive or retain. Defendant refuses and is unable to make good the guarantee contained in the statute, requiring the treasurer to execute to the purchaser a deed of conveyance for such unredeemed lands, and refuses upon demand to refund the consideration paid therefor or any part thereof, and it now asks, at the hands of this court, a judgment that it be allowed to retain the respondents' money received without consideration, and that respondents' right to recover be denied.

It must be conceded that the money received by the county treasurer for these lands, was received without authority of law, for the territorial statute, section 62, chapter 28, from which alone the treasurer derived any authority to sell lands for taxes, only authorized him to sell "lands, town lots, or other real property, which *shall be liable for taxes.*" The

statute did not and could not lawfully authorize him to sell lands which were not liable for taxes, and which consequently could not be taxed, but which belonged to the public domain of the United States.

The acts of the treasurer in selling the lands to the respondents were wrongful, because committed without authority of law; in violation of express enactments, defining and restricting the treasurer's authority, and resulting in civil injury, not only to the owner of the lands unlawfully sold, but to the purchaser thereof wrongfully deprived of his money without consideration. The statute, section 73 of chapter 28, guaranteed to the respondents that if these lands were not redeemed within two years they should, upon production of their certificates of purchase, receive deeds conveying to them in the name of the territory, all of the lands remaining unredeemed, which deed should vest in them an absolute estate in fee simple.

The breach of this guaranty did not arise through any defect in the tax proceedings, which the purchasers might have discovered upon an inspection of the record of such proceedings and which would bring them within the rule of *caveat emptor*, but by reason of the fact that the entire proceedings from their inception were absolutely void and without authority of law. The question in controversy, therefore, is not one of irregularity in the assessment of the taxes levied or of the sale by the county treasurer, but is one of entire absence of power or authority in the taxing officers to assess and the treasurer to collect or make sale of the lands for their payment. The sale by the county treasurer in the case at bar was to en-

force a supposed lien. Had the lands been subject to taxation, a lien of the taxes would have been good and sufficient to have passed the title of the railroad company to the purchaser, unless defeated by some irregularity in the proceedings, but these lands not being subject to taxation, there was no lien to enforce, consequently nothing on which a tax title could be predicated. A valid lien is the basis of all judicial, as well as tax sales. When there is absence of a valid lien and a failure of title thereby, a purchaser at such sale may resist payment of his bid, or if he has paid the same, may successfully maintain his action for restitution. This position is elementary.

Freeman in his work on void judicial sales says:

> "No doubt the bidder at a void sale is entitled to be relieved of his bid. If the judgment or order of sale is void, or if, from any cause, the conveyance when made cannot vest him with the title held by the parties to the suit or proceeding, then his bid or other promise to pay, is without consideration and cannot be enforced. The distinction between *void sales* and *defective titles* must be kept in view to avoid any misapprehension of the rights of one who has purchased at an execution or judicial sale. If he obtains nothing because of a defect in the proceedings, he can defeat an action for the amount of his bid. If on the other hand, the proceedings are perfect but the defendant had no title to be sold or conveyed, the purchaser is nevertheless, bound by his bid."
>
> Freeman on Void Judicial Sales, Section 48.
>
> Freeman on Executions, 313 (H.)

The rule of *caveat emptor* as applied to tax sales purchases has never, to our knowledge, been held to apply to a case where there was no charge or tax due

and consequently no lien against the property sold. Where by authority of law a valid tax has been levied and ~~subsequently~~ made a charge upon property within the jurisdiction of the taxing officers, and by reason of some subsequent irregularity or omission between the assessment and the sale (which is the culmination of the tax proceedings), such sale is rendered void, a purchaser at such sale is held to have constructive notice of such defects. His payment is held to be a voluntary one, justly due as a charge upon the property sold, which he having paid with constructive notice of the defects or omissions rendering his title invalid, cannot recover back. But where as in this case, there was no jurisdiction of the subject matter, the lands not being taxable, and such as owed no charge to the government, or where the levy is made without authority of law, or the assessment void for want of jurisdiction, so that nothing is due in the nature of a tax, the sale in such cases being entirely unauthorized by law, there existing no lien to enforce, or charge to collect, the same is an unauthorized assumption of power which does not exist. Nothing passes by it to the purchaser. No right to receive or retain the money exists in the officer making the sale, and in such cases the courts have uniformly held that the purchaser, who thus paid his money and got nothing for it, should have the same returned to him. And so whenever the question has been raised, the courts have not hesitated to protect bidders at public sales, when there existed, from any cause, an entire absence of power to make the sale, refusing to enforce the payment of the bid or ordering restitution

thereof. And in such a case it matters not that the officer making the sale mistakenly supposed he had full power to do so.

Campbell v. *Brown*, 6th How. (Miss.) 230.
Todd v. *Dowd*, *1 Metc.* (Ky.) 281.
Washington v. *McCaughn*, 34th Miss. 304.
Riddell v. *Hill*, 51st Alabama 224.
Bokin v. *Cook*, 61st Alabama, 472.
Burns v. *Ledbetter*, 56th Texas 282.
Laughman v. *Thompson*, 6 S. & M. 259.
Barton v. *Thompkins*, 4 Sneed 623.
Norton v. *Supervisors*, 13th Wis. 612.
Chapman v. *City of Brooklyn*, 40th N. Y. 372.
Approved in *People* v. *Chapin*, 5th N. E. Rep. 64.
Bank v. *Mayor of N. Y.*, 43rd N. Y. 184.
Newman v. *Supervisors*, 45th N. Y. 678.
Swinger v. *Hickok*, 53rd N. Y. 280.
Preston v. *City of Boston*, 12 Pick. 7.
Corbin v. *Davenport*, 9th Ia. 239.
Phillips v. *City of Hudson*, 31st N. J. Law 143.
Burns v. *Hamilton*, 70th American Decisions, 580.
Dodd v. *Neilson*, 90th N. Y. 243
Commissioners v. *Young*, 18th Kan. 440.
State v. *Shacklatt*, 37th Mo. 380.
Clapp v. *Pine Grove Township*, 138 Pa. State 35.

Applying the same rule it has been repeatedly held that taxes illegally imposed and collected may be recovered back.

Slack v. *Norwich*, 33rd Vt. 818.
Saulters v. *Victory*, 45th Vt. 357.
Dowd v. *Boston*, 6th Gray 131.
Gillette v. *Hartford*, 31st Conn. 356.

We understand the rule of these cases as applied to the payment of illegal taxes, and to money paid at tax sale, rendered void for want of jurisdiction, to be in perfect harmony with the principles announced by this court in its application of the rule, that money paid by mistake of fact or where the thing claimed to be sold does not exist, and the consideration, therefore, fails, or where money is obtained by fraud or imposition, may be recovered back.

Louisiana v. *Wood*, 102nd U. S. 294.

The act of selling these lands without authority of law, to the injury of the respondents, was either a wilful wrong or else resulted from a mistake of fact on the part of the county treasurer and other officers of the county, in supposing that the lands did not belong to the United States, but that all the conditions of the grant to the Northern Pacific Railroad Company had been performed by the grantee and that title had passed to it. The reasoning of the learned supreme court of the state of Kansas, in the case of *Commissioners* v. *Young*, 18th Kan. 440, can be applied with equal force to this case. In 1868, the proper officers of Saline county, Kansas, levied taxes on certain lands; subsequently the plaintiff purchased

the same and received the usual certificate of purchase from the county treasurer. The lands so purchased were a part of the grant of congress to the Leavenworth, Pawnee and Western Railway Company, which afterwards became the Kansas Pacific Railway Company. By the terms of the grant, the lands became the property of the railway company, when the conditions thereof were all performed, and not until then. One of these conditions was that the railroad company should complete its road through these lands before any title should pass. This condition had not been fully performed. Upon the question of the plaintiff's right to recover back the amount of money paid at tax sales, the court say:

> "Now the completion of a railroad is certainly more a question of fact than of law, and no person is bound to take notice of its completion as a matter of law, and therefore, no one can be presumed to have known when said lands became taxable. But is any one in any case bound to know, as a matter of law, when the title of land so passes from the government that the land becomes taxable? As we have said, the land is taxable as soon as some person is entitled to receive a patent therefor, but the patent may not issue for months and even years after such person is entitled to receive it. Is any person bound to know when all the facts transpire, which give to any person a right to receive a patent for such land from the government? Can it be that the law requires any such thing? And when the patent is issued, is any person, except the person to whom it is issued, bound to know that fact? It is true the patent is recorded in Washington, but is any person bound to take notice of that record? Now whether this said error or irregularity to be discovered, must necessarily be one of fact, or whether it may not be one either of law

or fact, we do not think it necessary to decide in this case. For the error or irregularity actually discovered in this case, was probably and presumably one of fact. It consisted in supposing that the lands did not belong to the United States, and that they were taxable, while in fact said lands did belong to the United States and were not taxable. Such an error is sometimes, as we have seen, a mistake of fact, probably it generally is, and possibly it always is."

The learned supreme court of Kansas has very intelligently and concisely distinguished this class of cases from those subject to the rule of *caveat emptor.*

The rule that a purchaser can not recover the money paid by him at a void tax sale, is based upon the principal that he is a volunteer in the payment of charges levied on lands subject to taxation, and has been applied only in cases where jurisdiction existed and where the title of the purchaser failed by reason of non-compliance with the statute causing irregularities in the assessment levy or sale as appeared by the records which were held to be constructive notice to the purchaser of such irregularities, and to this class of cases only has the rule of *caveat emptor* been applied.

Sullivan v. *Davis*, 29th Kan. 21.

Lynde v. *Inhabitants of Melrose*, 10 Allen, (Mass.) 49.

Rice v. *Auditor General*, 30th Mich. 12.

City v. *Humphrey*, 84th Indiana, 469.

Budge v. *City of Grand Forks, N. D.* 47, N. W. Rep. 390.

The application of the rule *caveat emptor* to the

purchase of lands at tax sales, under the revenue system of this country is most clearly stated by Mr. Cooley in his work on Taxation, second edition, at pages 475 and 476.

> "The tax sale is the culmination of proceedings, which are matters of record and it is a reasonable presumption of law that where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights or tend in any contingency to affect them. A tax purchaser consequently cannot be, in any strict technical sence, a bona fide purchaser, as that term is understood in the law because a bona fide purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it, but the tax purchaser is always deemed to have such notice *when the record shows defects*. He cannot shut his eyes to what has been recorded for the information of all concerned, and relying implicitly on the action of the officers, assume what they have done is legal, because they have done it."

The rule seems to be well settled, that in the absence of a statute, if one purchases land at tax sale, the title of which subsequently fails, by reason of the existence of defects in the tax proceedings of which the purchaser had actual or constructive notice, he cannot recover, but if as in this case he purchases an apparently good title, as shown by the entire record of tax proceedings, but in fact acquires no title by reason of the nullity of the entire proceedings for want of jurisdiction, the consideration having been paid under mistake of the purchaser's rights and duty, a consideration which he was under no legal or moral

obligation to pay and which the county had no right in good conscience to retain, it may be recovered back.

In the case of *Thompson & White* v. *Richard Rowe*, 22nd How. 422, this court apparently recognizes the rule thus stated, in defining the duty of a purchaser of a tax title as follows:

> "The purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it."

There is no requirement that the purchaser shall make inquiry with reference to the taxability of the lands or the authority to make an assessment.

City v. *Humphrey*, 84 Ind. 469.
McWhinney v. *City*, 98 Ind. 183.
Packard v. *Limerick*, 34 Maine, 269.

In the case of *Norton* v. *The Supervisors of Rock County*, 13th Wis. 684, the action was brought to recover money paid at tax sale by the purchaser of lands, title to which subsequently failed, by reason of defects going to the jurisdiction of the taxing officers, and recovery was sought both by reason of the rule of the common law and that of the statute of Wisconsin. The court say:

> "Of the plaintiff's right to have the money back there is no question. The statute expressly provides that in all such cases the county treasurer shall refund the money with interest to the purchaser, or his assigns.
>
> Section 110, Chap. 115, R. S. 1849.
>
> We think the same result would follow without any statute by an application of the general principles, that money paid for a consideration which fails may be recovered back. The counsel for the respondent

contended that it was analogous to a sale on execution, wherein the judgment debtor's title to the land sold failed. He said the purchaser in such a case buys at his own risk, and if the judgment debtor had no title, still the purchase money could not be recovered back. But we think the two cases are entirely different. In the execution sale the purchaser bargains for the interest of the judgment debtor in the land. He understands beforehand that he is to ascertain at his own risk what that interest is and what its value. If the sale conveys to him that interest, there is no ground upon which he can recover back his money, even though the interest should prove less than he expected, or nothing at all, because by the very terms of the contract he took that risk; but in the case of the tax sale it is not the title in the lands that fails, but it is the authority to make any sale at all.

It would be analogous to an execution sale where there was no judgment or execution. And we do not understand that in such a case the purchaser could not recover back his money. On the contrary it would seem clear that he ought to, where there was a mutual mistake as to the facts of there being a judgment and an execution, and the same is true of a tax sale where there is no authority to make it and it ought not to be said even in the absence of any statute upon the subject, that in such cases the purchaser takes the risk of there being no authority to sell. * * * Our statute therefore, which places the matter beyond doubt so far as tax sales are concerned, has only embodied in express terms that which would have resulted without it from an application of general principles to the subject."

This rule has been repeatedly recognized and followed in Wisconsin.

Van Cott v. *Supervisors*, 18th Wis. 247.
Warner v. *Supervisors*, 19th Wis. 611.
Hutchinson v. *Supervisors*, 26 Wis. 402.
Barden v. *Supervisors*, 33rd Wis. 445.
Marsh v. *Supervisors*, 42 Wis. 373.

In *Foster* v. *Pierce County*, (Neb.) 17th N. W. Rep. 261, and *Welton* v. *Merick County*, (Neb.) 20th N. W. Rep. 111, the case turned upon the taxability of the lands, and in both cases the court held that the lands were clearly taxable, while in *Roberts* v. *Adams County*. (Neb.) 30th N. W. Rep. 405, the court, speaking through Chief Justice Maxwell, say:

> "The county through its treasurer, by offering a tract of land for sale, for taxes claimed to be due thereon, in effect says to the purchaser, that the land offered for sale was taxable, and the taxes have not been paid. Honesty and fair dealing require that a county, no more than an individual, shall be permitted to obtain and retain money paid under a mistake of fact."

The court then proceed to discuss the liability of the county as created by the statute of Nebraska. The lands involved in the Adams county case, like those in the case at bar, were not taxable by reason of the fact that title had never passed from the national government.

In *Phillips* v. *City of Hudson*, 31 N. J. L. (2nd Vroom) 147, the plaintiff sought to recover by reason of a void assessment and consequent lack of jurisdiction to tax or sell said land. The court say:

"The right of the plaintiffs to recover, for the reason that the sale was made in pursuance of an illegal and void ordinance and assessment, is resisted upon the ground that they have no remedy for a failure or defect of the title to the land purchased but such as may be provided for by covenants in the declaration of sale, which, it is insisted, was intended to operate and must be treated as a conveyance or lease to the plaintiffs of the term in the premises assessed, for which they agreed to pay the money now demanded.

It is undoubtedly the well established rule of law that so long as a contract for a sale of land is executory, only the purchaser is entitled to have a good title, unless the contrary is expressly or impliedly agreed; but when the bargin is consummated by the delivery and acceptance of the deed the purchaser must look to the covenants he has taken care to have provided, and in the absence of fraud has no right to relief, either at law or in equity, for defects of title, except as such covenants afford it. (Rawle Cov., Tit. 606; Cro. Jac. 196; 1 Salk. 211; 1 Term R. 762; 13 Ves. 121; Doug. 665; *Frost* v. *Raymond*, 2 Caines 188; *Commonwealth* v. *McClanachan*, 4 Rand. (Va.) 482.)

In the case of a sale of a freehold estate, although originally the word 'give' imported a covenant of warranty, and Lord Eldon, in *Browning* v. *Wright*, 2 B. & P. 21, said the words 'granted,' 'bargained,' 'sold,' 'enfeoffed' and 'confirmed,' certainly import a covenant in law; it seems now to be settled that in conveyances by deeds of bargain and sale they have no such effect; but on the creation of an estate less than freehold a covenant of title is implied from the words of leasing. (Rawle 272, and cases.)

No lease or conveyance is authorized by the law under which this sale was made, probably for the reason that no estate of any kind was intended to be created until the expiration of two years allowed for redemption, and for the reason also that it was not expected to bind the city to make good any defect in the title of the ostensible owner. The declaration of sale delivered to the purchaser, as set forth in the declaration contains no words of grant, and is in fact a mere receipt for the purchase money, with a full statement of the assessment, advertising and sale, made by the act evidence of the truth of the facts recited, so as to enable the purchasers, if the land was not redeemed, and the notice of the time of redemption was duly given, to enter upon the possession of his term. The title depended not on the decision itself but on the facts of the assessment, sale and payment of the purchase money, and of the notice required by the thirty-ninth section.

This case therefore, in my opinion does not come within the rule that a purchaser who takes a conveyance of real estate must take care to protect himself against a failure of title by appropriate covenants or take the risk on himself, for the reason that no conveyance was made or was intended to be made in which covenants could be inserted. The rule is technical and does not apply if a conveyance is not in fact perfected. In that event the purchaser can recover back his money if the title fails, even where he has taken possession of the property.

Cripps v. *Read*, 6 Term R. 608;
Johnson v. *Johnson*, 3 Bos. & Pul. 166.
Williams v. *Read*, 5 Pick. 540.

In the case of sale of real estate by the possessor a formal covenant is required because, as was said by Lord Eldon in *Hern* v. *Mill*, 13 Ves. 122, 'no person in his senses would take an offer of a purchase from a man merely because he stood upon the ground. It is not even *prima facie* evidence. He may be a tenant by sufferance or a trespasser. A purchaser must look to his title; and if, being asked for the deeds, he acknowledged he has not got them, the purchaser is bound to further inquiry.'

He is required to inform himself and rely on his own judgment or that of his legal adviser, or to protect himself by covenants if he wishes also to rely on the guarantee of the seller. In the case of a sale by a public officer, it is understood from the nature of the case, the seller only undertakes to convey such a title as the owner or possessor had, and is only bound to act in good faith by virtue of a valid authority, and can be required to covenant only against his own acts. The general rule of the common law in regard to sales of real estate and personal property is *caveat emptor*; but in the sales of personal property by a person professing to be the owner, the title passing by delivery only, a warranty of the title is implied. In the case of *Morley* v. *Attenborough*, 3 Exch. R. 513, Justice Parke threw some doubt on the doctrine of warranty in sale of goods and chattels, but the point actually decided was, that upon the sale of a pledge by a pownbroker, from the nature of his occupation,

he only undertook that the subject of the sale was a pledge and irredeemable, and that he was not cognizant of any defect of title to it. A sale of personal property by an officer only implies that he had authority to sell such a title as the ostensible owner had. (9 Wheat. 616, 1 Blackf. 10; 3 Watts. 490; 5 Munf. 287.)

In the case of *Peto* v. *Blades*, 5 Taunt. 657, it was held that the law raises an implied promise in a sheriff selling goods taken on execution, that he does not know that he is destitute of title to the goods. In the case of *Putman* v. *Westcott*, 19 Johns. 73, it was held that where a constable sold a leasehold estate and received the purchase money, it might be recovered back on the ground that he had no authority to sell such a property. A sheriff who should undertake to sell real estate by virtue of a void execution, certainly could not enforce such a sale and oblige the purchaser to take and pay for the property. Whether the money paid on such a purchase could be recovered back in the absence of fraud, if the purchaser should be incautious enough to take the deed without requiring covenants to meet such a defect, may be doubtful; but in such a case the sheriff's freedom from liability, if it exists, would rest altogether upon the technical rule that he was bound only to the extent of the covenants contained in the deed.

The statutes of Vermont and New Hampshire require the officer selling land for taxes to make a deed to the purchaser with a covenant of warranty. It has, however, been held in both these states that the officer is not personally liable on such a covenant for the defect in the tax payer's title.

Gibson v. *Mussey*, 11 Vermont 212;
Wilson v. *Cochrane*, 14 N. H. 397.

Blackwell on Tax Tit. 444, commenting on these decisions, remarks: 'Whether the collector might not be responsible for his own omissions, neglects, and other irregularities upon such a covenant, is undecided. No objections, however, can be perceived to a recovery of the consideration money in such a case.'

An action will lie against a corporation to recover back a tax illegally levied. (*Sumner* v. *First*

Parish, 4 Pick. 361; 5 Pick 453, 503; 12 Pick. 7.) In the case before us the law directs a declaration of sale without covenants of any kind on the part of the city. If the land is redeemed by the payment of the purchase money and fifteen per cent. interest to the treasurer, there can be no doubt that the purchaser may recover the money by action for money had and received. And in my opinion he has a like remedy if the proceedings of the city authorities in making the sale were illegal and void, or if the sale fails to become available by the neglect to give the required notice of the expiration of the time limted for the redemption of the land.

But if the declaration of sale is to be considered in all respects equivalent to a formal conveyance of the term sold, I think the case comes within the principle that where the subject matter of the contract did not exist at the time of the sale the contract is not binding. If a chattel is sold and at the time of the sale it does not exist, the contract is not binding on the purchaser; and if in ignorance of this fact he had paid the purchase money, he can recover it back.

Barr v. *Gibson*, 3 M. & W. 390.

Strickland v. *Turner*, 14 E. L. & E. R. 471.

And the same rule applies to real estate.

Stent v. *Bailis*, 2 P. Wms. 217.

In the case of *Hitchcock* v. *Giddings*, 4 Price 135, Chief Baron Richards ordered a bond, given for the purchase money of a remainder in fee expectant on an estate tail, to be given up and the interest paid on it to be refunded, on the ground that it turned out that the tenant in tail had suffered a recovery and thus destroyed the remainder before the execution of the conveyance, of which fact both parties were ignorant. The supreme court of New York held this principle applicable to a case like the present, I think rightly, although I do not concur in all the reasoning of the judges.

Martin v. *McCormick*, 4 Seld. 331.

Gardiner v. *Mayor of Troy*, 26 Barb. 423.

I am aware that the case of *Hitchcock* v. *Giddings* has been questioned, and may, perhaps, be a doubtful application of the principle on which it was decided. I

cannot doubt, however, that if there should be a regular sale and conveyance of real estate which should turn out never to have existed or to have been totally destroyed before the contract of sale was consummated, so that there was nothing upon which the conveyance could operate, the contract and conveyance would be treated as having no validity and the consideration money might be recovered back. The case before us, in my opinion, falls within the same principle. The defendant has nothing to sell and the purchaser acquired nothing. There never having been a valid ordinance for making the contemplated improvement, the declaration of sale was a nullity; the mayor had no authority to affix to it the corporation seal. It cannot, therefore, be set up against the plaintiffs as in any way affecting their rights. The case stands as if no conveyance had been executed.

The argument relied on for the city was, that the purchasers had the means of knowing what the facts were, and bought upon speculation a property which, had their right of possession actually accrued for the long term agreed on, would have been of great value. No doubt sales of this description, owing to the very common neglect of city officers to comply with the directions of the statute under which they profess to act, are exceedingly uncertain and precarious. But it is against public policy to increase this evil by failing to hold them to a strict accountability. Purchasers have a right to presume that they have done and will continue to do their duty, and are not bound to require covenants to this effect, any more than upon a purchase of property from the owner to require covenants that the subject matter of the purchase does in fact exist."

THE NEW YORK CASES.

In *Chapman* v. *Brooklyn*, 40th N. Y. 372, plaintiff sought to recover the consideration paid for lands at tax sale, title to which failed by reason of a void assessment for want of jurisdiction. The

Court of Appeals, Justice Daniels delivering the opinion of the court, says:

"The rule ordinarily applicable to cases of this description is well stated by Parsons in his work upon contracts. It is as follows: 'Where the consideration appears to be valuable and sufficient, but turns out to be wholly false, or a mere nullity, or where it may have been actually good, but before any part of the contract had been performed by either party, and before any benefit had been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, then the promise resting on this consideration is no longer obligatory, and the party paying or depositing money upon it can recover it back.' (1 Parsons on Cont., 2d. ed. 386.) And to the same effect are *Colville* v. *Besly*, 2 Denio, 139, 142.

Bank of Commerce v. *Union Bank*, 3 Cow. 230, 237.

Mowatt v. *Wright*, 1 Wend. 355, 360.

Wheaton v. *Olds*, 20 Wend. 174.

Waite v. *Leggett*, 8 Cowen, 195.

No sound reason exists for exonerating even municipal corporations from the controlling effects of this wholesome principle; for it is equally as unjust and inequitable for them to retain money they have acquired without consideration, as it is for a private person to attempt to do so. No principle of morals or of law can be invoked against the latter, which does not apply with the same force to the case of the former, and this has generally been heretofore regarded as including corporate bodies, as well as private persons (Angell and Ames on Corporations, 4th ed. sec. 237, and cases cited in note 4 id. sec. 379,) such bodies being held liable upon implied as well as expressed promises.

Danforth v. *President* &c. 12 John. 227, 231.

Bank of Columbia v. *Patterson's Adm'r*, 7 Cranch. 299.

In the last case Judge Story, delivering the opinion of the court, said:

'It would seem to be a sound rule of law that, wherever a corporation is acting within the scope of

the legitimate purposes of its institution, all parol promises made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request raise implied promises, for the enforcement of which an action may well lie.' (Id. 306.)

Under the action of the benign principle already mentioned as applicable to cases of this description, it has been repeatedly held in other states that taxes illegally imposed and collected might be recovered back from the municipality into whose treasury they had been paid.

Gillette v. *Hartford*, 31 Conn. 356.
Slack v. *Norwich*, 33 Vermont, 818, 823.
Preston v. *City of Boston*, 12 Pick. 7.
Boston and Sandwich Glass Co. v. *Boston*, 4 Met. 181.
Dow v. *Boston*, 6 Gray, 131.
Joyner v. *Third School District*, 3 Cushing, 567.
Dunnell Manufacturing Co v. *Pawtucket*, 7 Gray 277.
Shaw v. *Becket*, 7 id. 442.
Toney v. *Inhabitants of Millbury*, 21 Pick. 64.
Joy v. *Oxford*, 3 Greenleaf's Repts. 131.

The propriety of applying this principle to the recovery of taxes and assessments unlawfully imposed, has been doubted, though not positively denied, in this state.

Swift v. *City of Poughkeepsie*, 37 N. Y. 511.

As the assessors in that case, did not proceed without jurisdiction, the plaintiff was properly defeated on that ground, so that no actual decision was made upon that point. The remedy may be withheld from that class of cases, without affecting the present controversy, for they may be reviewed by *certiorari*, or the assessors acting without jurisdiction may render themselves personally liable for the money afterwards collected under their proceedings.

Mygatt v. *Washburn*, 15 N. Y. 316.

But in the present action the plaintiff must recover the money from the defendant or be left entirely without redress. No very good reason can be urged against maintaining the rule as far as it has been ex-

tended in the other states, since there is no room for doubting but that a remedy would be afforded between individuals for the recovery of money in cases where, by color of void judicial proceedings, it might be forcibly taken from one and delivered to another.

The defendant will be subjected to neither loss nor hardship in being compelled to refund the money in controversy, for it has still the power to make the assessment as it should have been made upon these lots, and to institute and carry on the proceedings required for its lawful collection.

Laws of 1850, 280, sec. 21.

Meech v. *City of Buffalo*, 29 N. Y. 198, 214-15.

In the present case, the defendant's own certificates imply an obligation to convey the term sold in the lots, for they contain a statement that, at the expiration of two years, the purchaser would become entitled to a conveyance of the premises. Not a mere formal conveyance, but one which would secure to him the fruits of his purchase, in case no redemption should be previously made. And that obligation it is out of the power of the defendant to perform.

The money in controversy, both legally and equitably belongs to the plaintiff, and it would not be creditable to an enlightened administration of the laws to turn him out of court without it."

In *Clapp* v. *Pine Grove Township*, 138 Pa. State, 35, cited *supra*, the plaintiff's claim arose from a sale of lands doubly assessed, and the court held that at common law a purchaser at tax sales may recover from the municipality the purchase money paid for lands, upon which no tax was due at the time, and also redemption money paid by such purchaser on a subsequent illegal sale. Mr. Justice Williams, delivering the opinion of the court says:

"If the treasurer who is authorized to collect unpaid taxes by the sale of the lands against which they are charged should receive full pay-

ment of the taxes and costs, the lien of the taxes would be discharged and the power of the officer to make the sale divested. If, notwithstanding such payment and its legal consequences, the treasurer should proceed to sell, the rule of *caveat emptor* ought not to apply, for the reason that the treasurer being without the power to sell can make no sale, the attempt to do so can impose no liability and confers no rights on any one. The attempt to make a sale under such circumstances is an unauthorized assumption of power which does not exist, and one who has become a purchaser at such sale has a right to have his money returned to him. * * * The second or double assessment was unauthorized; the taxes assessed under it were illegal and void * * When the plaintiff paid his money by way of redemption and settlement of accruing taxes, he discharged no obligation and he acquired no rights. He simply paid over so much more money under the influence of the unauthorized and illegal acts of the tax officers; it was still his money; they had no claim upon it, and no right in *law* or *morals* to withhold it from him."

In the case of *State* v. *Shacklatt*, 72nd Mo. 28, *supra*, the same principles were laid down. The court held that a purchaser can recover from the collecting officer money paid on his sale of property exempt by the laws of the state from taxation. The court held that the property sold being exempt from taxation, no taxes could be legally assessed thereon. No taxes were due and the collector was without power or authority to sell and that, therefore, he and his bondsmen were liable to the purchaser for such wrongful sale.

Money paid by one under mistake of his rights and his duty, which he was under no legal or moral obligation to pay and which the recipient has no right in good

conscience to retain, may be recovered back in an action of assumpsit whether such mistake be one of fact or law.

Northrop Executors v. *Graves*, 19th Conn. 548.
Culbreath v. *Culbreath*, 7th Ga. 64.
Moses v. *McFerlan*, 2nd Burr. 1005.

THE NORTH DAKOTA CASES.

In the case of *Tyler* v. *Cass County*, (N. D.) 48th N. W. Rep. 232, the supreme court of North Dakota denies the doctrine of the courts of Dakota Territory, and hold that there is no right of recovery in this class of cases either at common law or by virtue of the statute. The issues were identical with those here involved.

The court bases its decision that there is no right of recovery at common law upon two propositions, both of which we contend are entirely unsupported by authority and in direct conflict with the repeated decisions of this court.

We quote them from the opinion.

First. "The taxing powers of a state are plenary and extend to all property within its jurisdiction, not especially exempt. *Prima facie* all property within any given county is taxable."

Second. "A particular tract of property that belongs to a class that has been relieved of the burdens of taxation by express legislative enactment is just as free from such burden as the tract that belongs to the class that was never subject to the burden. And the county would have just the same legal right to the money received from tax sale of the one tract as of the other, and, as we view it, the duty would devolve upon the

> assessor in each case, and in the one just as much as in the other to decide primarily whether or not the respective tracts should be assessed. * * * The assessor is the first person to act in the process of the collection of the public revenue. His jurisdiction depends upon the antecedent act of no official. The law fixes his jurisdiction, and for taxation purposes it is coextensive with its geographical limits, and covers the whole subject matter of assessments. Every tract of land within those limits must either be placed upon or omitted from the assesment roll, and the matter must in each instance be determined by the assessor."

If we understand the learned court, it holds that all lands in the territory of Dakota were *prima facie* taxable; that the assessor was, for the purpose of selecting the subjects of taxation within his county, a judicial officer; that if he selected lands not within the jurisdicton of the taxing power, it was an error in judgment by a judicial officer acting judicially and not wrongful, so as to make the act of selling by the treasurer wrongful.

The authorities cited in support of these views are:

Butler v. *Supervisors*, 26 Mich. 22.

Robertson v. *Commissioners*, 44 Mich. 274.

Davenport v. *R. R. Co.*, 38 Iowa 633, holding that all property within a sovereign state is *prima facie* taxable; that "taxation is the rule and exemption from taxation the exception;" and *Foster* v. *VanWyck*, 41 How. Practice 493 on the jurisdiction of the assessor.

These were lands of the United States and all lands of the Untied States in a territory were *prima facie*

exempt from taxation by the territorial government, being still under the jurisdiction of the sovereign, which had placed a limitation upon the taxing power of the territory as follows: "No tax shall be imposed upon the property of the United States."

Sec. 1851, R. S., U. S.

The learned North Dakota court says: "There was no lack of jurisdiction in this case." The reasoning by which this conclusion was reached seems to have had its foundation in *Foster* v. *VanWyck*, 41 Hows. Practice, 493, which case was never regularly reported, presumably for the reason that the question of jurisdiction of the assessor was settled in *Van-Allen* v. *Assessors*, 3rd Wall. 573, pending the decision in *Foster* v. *VanWyck*, leaving that decision without binding force as it predicated the jurisdiction of the assessor upon the jurisdiction over the property and the right to tax the same.

In *Swift* v. *Poughkeepsie*, 37th N. Y. 511, the New York court took occasion to define the scope of the decision in the case of *Foster* v. *Van Wyck*. The discussions upon this question commenced in the state of New York in the case of *Weaver* v. *Devendorf*, 3rd Denio, 117, which case settled the legal status of assessors and has been repeatedly referred to and approved by the court of appeals of that state. It places the assessor in the same legal status as Judges of courts of inferior jurisdiction.

In *Prosser* v. *Secor*, 5th Barb. 607, which decision finally settled the law of the state of New York on the subject, the court say:

the officers have power to act, but err in the exercise of the power, the latter where they have no power to act at all, and it does not aid them to decide that they have. It is argued that they have jurisdiction to determine what property is taxable in the town. (And this is what the learned court of North Dakota contends for.) This is a mistake. The legislature determine that question and the officers have no power over it."

See also, *Doyle* v. *Strickland*, 57 N. Y. 472.

In Re Hermans, 71st N. Y. 488.

Williams v. *Weaver* 75th N. Y. 33.

In Re N. Y. Catholic Protectory, 77 N. Y. 342.

Hitton v. *Fonda*, 86th, N. Y. 348.

Freeman v. *Kenny* 15 Pick. Book 44.

Gregory v. *Bugbee* 42 Vt. 480.

Martin v. *Mansfield*, 3rd Mass. 419.

The same question seems to have been settled by this court, in harmony wfth the state decisions hereinafter cited in *Hays* v. *The Pacific Mail Steam Ship Co.* 17 How., U. S. 597.

In the case of *N. P. R. R.* v. *Traill County*, 115 U. S. 600, this court says, (speaking of these N. P. lands in the territory of Dakota assessed under territorial laws herein cited:)

"*If the assessment is valid* and the proceedings well conducted the case confers a title paramount to all others and thereby destroys the lien of the United States."

This court then enjoined the sale of these lands as a threatened wrongful act by the treasurer of Traill county, Dakota, because the lands to be sold were lands of the United States and the assessment there-

of by the assessor of Traill county, void, for want of jurisdiction of the subject matter.

Assuming that the assessor had no jurisdiction of the subject matter, the treasurer was not protected by his warrant in the sale of the lands in question and his acts were wrongful under the numerous decisions of this court, pertinent to the subject.

When a court or other officer acts without jurisdiction of the subject matter, all is void and such acts are regarded in law as nullities, constituting no justification, but all persons concerned in executing such judgments or any process predicted thereon are trespassers and liable to an action thereon.

Griffith v. *Frazier*, 8th Cranch 9.
Dynes v. *Hoover*, 20th How. U. S. 65.
Erskine v. *Hollenback*, 14th Wall. 613.
Hayes v. *Pacific Mail Steam Ship Co.*, *supra*.

In the latter case this court say:

"An objection is taken that the recovery aginst the collector on the ground mainly that the assessment under the law of California by the assessors was a judicial act and that the party should have pursued his remedy to set it aside, according to the provisions of that law. We do not think so. *The assessment was not a judicial but a ministerial act and as the assessors exceeded their power in making it the officer is not protected.*"

We are aware that the doctrine announced by this court in the case above cited and in *Dynes* v. *Hoover*, 20th How. U. S. 65, and *Erskine* v. *Hollenback*, 14th Wall. U. S. 613 has not been accepted by some of the state courts, including that of North Dakota in the case *Tyler* v. *Cass County*; *but the rights of the*

respondents arose under the statutes of a territory of the United States became vested under the laws of the United States, and the law as announced by its supreme court in this case, was clearly within the rule established by a long line of adjudications of this court, under which the rights of the parties had become fixed.

THIRD.

THE STATUTORY REMEDY.

THE STATUTE, SECTION 78, CHAPTER 28, POLITICAL CODE (SECTION 1629, COMPILED LAWS OF DAKOTA) IS CUMULATIVE AND NOT EXCLUSIVE. IT IS MERELY DECLARATIVE OF THE COMMON LAW RULE "THAT AN ACTION LIES FOR MONEY PAID BY MISTAKE OR UPON A CONSIDERATION WHICH HAPPENS TO FAIL, OR FOR MONEY GOT THROUGH IMPOSITION."

Moses v. *McFerlan*, 2nd Burr. 1005.

Louisiana v. *Wood*, 102 U. S. 294.

The statute reads:

> "When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer."

If the doctrine announced by this court in *Hayes* v. *The Steam Ship Company*, *supra*, applies to the facts of this case and the assessor in selecting the subjects for taxation did not act judicially and the treasurer in selling lands not subject to taxation was not protected by his warrant, then the reasoning of this court in the case of *Louisiana* v. *Wood*, *supra*, may be applied with equal force to determine the legislative intent in enacting the statute above quoted to show that the statute is but declatory of the common law. The present action can be sustained on either of the two grounds mentioned in the statute. The money was paid for the lands which the treasurer had no right to sell, the entire tax proceeding being apparently regular and valid as shown by the record thereof, which was constructive notice to the purchaser. The treasurer, therefore, in offering these lands for sale, represented that they were lands which the county had a right to tax and to sell for taxes, when, by reason of the fact that the Northern Pacific Railroad Company had failed to comply with one of the conditions precedent in its grant, title had not passed from the government and they were consequently not taxable.

This was clearly money paid by mistake. The consideration on which the payment was made has failed because the lands, not being taxable, the treasurer could not fulfil the promise made by the statute to the purchaser, to-wit: That he would execute to him, a deed, which should vest in him an estate in fee simple in said lands. The act of the treasurer was wrongful because it operated to the injury of the respondents and was not authorized by law.

It is admitted that these were lands "on which no tax was due at the time." To give the statute the construction contended for by respondents, renders it, as to the money paid at tax sale, simply declaratory of the common law rule applicable to the facts of the case. To give it the construction contended for by appellant, is to narrow and restrict the remedy already existing at common law, and admitting the plaintiff's right to recover without the statute—such a construction renders the statute absurd. Nearly the whole civil code of Dakota and much of its code of proceedure is but a declaration of recognized common law principles. The statute has simply amplified the plaintiffs remedy at common law, by permitting him to recover in addition to the amount originally paid for the lands, the same rate of interest that he would have received upon redemption within the two years intervening between the sale and the deed. The territorial government said to purchasers at its county tax sales, where lands were sold both for territorial and county taxes:

> "For such lands as you may purchase you shall receive, if redemption takes place, the amount of your payment with interest at thirty per cent per annum, together with all subsequent taxes paid for any year or years previous or subsequent to such sale, with interest at the same rate.
>
> Section 70, chapter 28, political code. (Section 1635, compiled laws, Dakota.)
>
> If at the end of two years, said lands are not redeemed you shall receive from the county treasurer 'A DEED IN THE NAME OF THE TERRITORY WHICH SHALL VEST IN THE GRANTEE AN ABSOLUTE ESTATE IN FEE SIMPLE IN SUCH LANDS', subject,

however, to all the claims which the territory may have thereon, for taxes or other liens or incumbrances.

Section 73, chapter 28, political code (section 1638, compiled laws, Dakota.)

And if the treasurer shall wrongfully or by mistake sell you lands upon which no tax was due at the time of such sale the county shall save you harmless and you shall receive from it or its treasurer a like amount as upon redemption."

Section 78, chapter 28, political code (section 1629, compiled laws, Dakota.)

Sec. 10, chap. 28, political code (Sec. 1635, compiled laws) *which provides for redemption at any time before the execution of the deed.*

The states of Iowa, Nebraska, Kansas and Wisconsin had previously enacted similar statutes to the one above quoted and while no two of them were couched in exactly the same language, they were prompted by a common object, designed to subserve a common purpose and in each instance when construed by the highest courts of those states so as to give effect to the object designed by the legislature, they have received a common construction.

This law must be construed by considering it in its relation to the entire revenue system of the territory of Dakota so as to give effect to the object designed by the legislature, and to that end all its provisions must be examined in the light of surrounding circumstances.

In Re Ross, 140th U. S. 453.

What was the object which the Dakota legislature had in view in enacting this statute? Was it alone ot protect the purchaser at tax sales from acts which

were *peculiarly* and *exclusively those of the treasurer*, committed wrongfully or by mistake, and which consequently must appear of record, because all of the treasurer's acts connected with the collection of the revenue are made matters of record? This is the construction contended for by the appellant. Counsel contends that the treasurer could make no mistake of law or fact when no question of law or fact was presented for his decision. We submit that when the treasurer is directed to sell all lands "liable for taxes," (section 62, chapter 28, political code), there is just as much a question of law or fact presented for his decision, as is presented to the sheriff when he is directed to sell the property of the defendant on execution or when he is required to determine the exemption of property from execution. "The office of interpretation is to bring *sense out of the words* and not to *bring sense into them.*"

The revenue statutes of Dakota were in the main borrowed from the statutes of Nebraska and adopted by the first territorial legislature in 1862. To better show the purpose and intent of the legislature in enacting section 78, we quote some of the provisions of the revenue law of 1862 of the territory and similar provisions of the code of 1877.

CODE OF 1862.

CHAPTER 69.

Section 36. "On the first day of February the unpaid taxes for the preceding year shall draw interest as hereinafter provided, and taxes upon real property are hereby made a perpetual lien thereon against all persons, and taxes due from any person on personal property shall be a lien on any real property owned by such person."

Section 39. "On the first Monday in October, 1864, and in each year thereafter, the county treasurer is required to offer at public sale at the court house, or if there be no court house, at the office of the county treasurer, all lands on which taxes of any description for the preceding year or years shall have been delinquent and remain due, and such sale shall be made for and in payment of the total amount of taxes, interest and costs due and unpaid on such real property."

Section 54. "Immediately after the expiration of the term of three years from the date of the sale of any lands for taxes under the provisions of this act, the treasurer then in office shall make out a deed for each lot of land sold and remaining unredeemed and deliver the same to the purchaser upon the return of the certificate."

CODE OF 1877.

CHAPTER 28.

Section 56. "Taxes upon real property are hereby made a perpetual lien thereupon against all persons and bodies corporate except the United States and the Territory, and taxes due from any person upon personal property shall be a lien upon any real property owned by such person or to which he may acquire a title. All taxes shall as between vendor and purchaser become a lien upon real estate on and after the first day of November in each year."

Section 62. "That on the first Monday of October in each year, between the hours of nine o'clock, a. m., and four o'clock, p. m., the treasurer is directed to offer at public sale at the court house or place of holding courts in his county, or at the Treasurer's office, where, by law the taxes are made payable, all lands, town lots, or other real property, WHICH SHALL BE LIABLE for taxes of any description for the preceding year or years, and which shall remain due and unpaid, and he may adjourn the sale from day to day until all the lands, lots, or other real property have been offered, and no TAXABLE PROPERTY shall be exempt from levy and sale for taxes."

Section 73. "If no person shall redeem such lands within two years, at any time after the expiration thereof, and on production of a certificate of purchase, the treasurer of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, IN THE NAME OF THE TERRITORY, a deed of the lands remaining unredeemed, WHICH SHALL VEST IN THE GRANTEE AN ABSOLUTE ESTATE IN FEE SIMPLE, IN SUCH LAND, subject, however, to all the claims which the territory may have thereon for taxes or other liens or incumbrances."

From the above comparison it will be seen that after the adoption by the territorial legislature of its revenue system as contained in the statutes of 1862, it changed the same by amendments in the following particulars:

First. By changing the clause defining the treasurer's authority to sell lands for taxes, which read "all lands on which taxes of any description for the preceding year or years shall have been delinquent and remain due" so as to read "all lands SUBJECT TO TAXATION" and by adding the words "and no taxable property shall be exempt from levy and sale for taxes."

Second. By amplifying the clause requiring the treasurer to execute a deed to the purchaser, which in 1862 read "the treasurer then in office shall make out a deed for each lot of land sold and remaining unredeemed," by adding thereto "IN THE NAME OF THE TERRITORY, WHICH SHALL VEST IN THE GRANTEE AN ABSOLUTE ESTATE IN FEE SIMPLE IN SUCH LAND" &c.

We contend that it is perfectly obvious that the legislature of Dakota, by these amendments, intended to restrict the authority of the treasurer to sell lands, to such as were liable for taxes and subject to taxation and to offer additional inducements to persons to advance money upon security of tax certificates and to throw additional safeguards around such investments. If the contention of the appellant is correct and the words "LIABLE FOR TAXES" mean "apparently" liable and the words guaranteeing to the purchaser a

deed, which should vest in him a fee in such lands only mean that the treasurer would do it if he could and that if it turned out at the end of two years that the lands were taxable, lawfully sold and all proceedings regular, then and then only should the promise of the statute be fulfilled, then, certainly, the language contained in the amendments adopted by the legislature, subsequent to 1862 were meaningless and purposeless, or if adopted for any purpose it was to deceive purchasers at tax sales into believing that they were buying something, which they were not.

In the case of *Corbin* v. *Commissioners*, 1st McCreary, 521, arising under the statutes of Kansas, containing a similar provision to section 78 above cited, the court say:

> "The state is largely interested in the prompt collection of its revenue; when the owner of property fails to pay the taxes thereon, it becomes a matter of interest to the state to induce others to come forward and make the payment, taking a lien upon the property, which in default of redemption may ripen into a title. But tax titles are very uncertain, and investments in them are very precarious, because of errors and irregularity, which may not be known to the purchaser and which may vitiate the sale. In order then to induce capitalists to come forward and invest their moneys in such a manner as to replenish the treasury, the state of Kansas, by the acts of 1868 and 1876 said to all such, if you will bid at tax sales and pay your money, the amount invested, with interest, shall be refunded from the county treasury, in case the same is afterwards discovered to be irregular or void. This legislation did not of itself amount to a contract, but I think it did amount to a proposition on the part of the state, which when accepted and acted up-

on, became a contract binding upon the state, as well as upon the other party. I know of no element of a contract that is wanting."

In *Commissioners* v. *Faulkner*, 27th Kas. 164, the court say:

"Whenever a county has sold land for taxes when it ought not to have sold it, the purchase money has to be refunded upon the terms and directions of the statute. The legislature intended by the adoption of this section to offer additional inducements to persons to advance taxes upon the security of tax certificates. The statute is plain and unambiguous. The first general maxim of interpretation is, 'That it is not permitted to interpret what has no need of interpretation, when an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absured, there can be no reason to refuse the sense, which this treaty naturally presents; to go elsewhere in search of conjectures in order to restrict or extinguish it, is to endeavor to elude it.'"

In Olmsteads case, Brightley's Reports 9, (Pa.) it is said:

"It will be found that the soundest and safest rule by which to arrive at the meaning and intention of a law, is to abide by the words which the lawmaker has used;" and in *Packer* v. *Sensberry & Erie R. R. Co.* 19 Pa. St. 220, Black, C. J. says; "after all the best argument is to hold up the law and let it speak for itself. The broadest, plainest and most natural view we can take of it, is the one that brings us the soonest to the truth."

We submit that the statute in question is conceived in clear and precise terms; that the sense is manifest and leads to nothing absured. We submit further that considering this statute as it now stands in comparison with the statutes as they existed before the

amendments, this and this only seems to have been the object of the legislature. The construction contended for by appellant, would bring a sense into the words the opposite of their clear and well determined meaning.

The statute in question, section 78 of chapter 28, had its origin in the statutes of Iowa and exists there to-day in the same form as originally enacted. It was taken by Nebraska from Iowa and by Dakota from Nebraska. It is true that in the latter state the statute was, prior to the decisions by the supreme court of that state hereinafter quoted, amended so as to read "When by mistake of the treasurer *or other officer* lands are sold" &c.; but those decisions clearly show that no significance was given to the words contained in the amendment by the supreme court of Nebraska. The supreme court of Dakota, therefore, in the construction of this statute followed the familiar rule adopted by this court in numerous cases, by adopting the construction of the courts of those states by whose legislatures the statute was origionally adopted. The statute having been taken from Iowa and Nebraska, the legislature in adopting it, adopted the construction put upon it by the courts of those states, which construction became part of the law itself.

McDonald v. *Hovey*, 110 U. S. 619.

Railroad Co. v. *Moore*, 121 U. S. 558.

The cases referred to are:

Colter v. *Mahaska Co.*, 17th Iowa, 253.

Scott v. *Chickasaw Co.*, 46 Iowa, 253.

Morris v. *County of Sioux*, 42nd Iowa, 416.

McCann v. *Otoe Co.*, 2nd N. W. Rep. 707. (Neb.)
Roberts v. *Adams Co.*, 25th N. W. Rep. 726.
Roberts v. *Adams Co.*, 30th N. W. Rep. (Neb.) 404.
Wilson v. *Butler County*, 42 N. W. Rep. (Neb.) 891.

In *Scott* v. *Chickasaw County*, Iowa, and *Roberts* v. *Adams County*, Nebraska, the statute as substantially contained in section 78 of chapter 28 of the political code of Dakota was construed by the supreme courts of Iowa and Nebraska. In each of those cases the principles involved were identically the same as in the case at bar. The lands sought to be taxed and sold were a part of the public domain of the United States. In the Iowa case no discussion was had upon the application of the statute, but the relief granted necessarily involved the same construction as was given to it by the supreme court of Dakota Territory.

In the case of *Roberts* v. *Adams County*, 30th N. W. (Neb.) 404, the statute read as follows: Section 131 Revenue Laws of Nebraska:

> "When by mistake or wrongful act of the treasurer or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt the county shall hold the purchaser harmless, by paying him the amount of principle, interest and costs to which he would have been entitled had the land been rightfully sold."

This was not a case where a mistake was made in the tax certificate in the description of the land, but was a case where the lands were not subject to taxa-

tion. The court does not base its decision upon the ground that the sale was a mistake or wrongful act of some officer other than the treasurer, but says:

> "The statute applies to all cases where the land has been sold for taxes when no taxes were due thereon. The county, through its treasurer, by offering a tract of land for sale for taxes claimed to be due thereon in effect says to the purchaser that the land offered for sale was taxable and the tax had not been paid. Honesty and fair dealing require that a county no more than an individual, shall be permitted to obtain and retain money paid under a mistake of fact. Our statute has guaranteed the rights of a tax purchaser, so that he may recover the purchase money with interest, or if the lands were not taxable, or no taxes were due thereon, the purchaser would be unable to enforce his lien for taxes, hence the statute requires the county to hold the purchaser harmless by paying him the amount of principle, interest and costs."

Nowhere in the opinion is it intimated that the right to recover exists by reason of a mistake or wrongful act of the assessor and not of the treasurer. The remedy must arise from the wrongful act of the treasurer alone. He is the person who sells the land and receives the money. The wrongful act of the assessor consists in the assessment of the property; by this assessment no right of action accrues to the purchaser under the statute. The statute furnishes a public record of lands liable for taxes for the guidance of the treasurer in the performance of his duties under the statute.

Section 10, Chapter 28, Political Code.

Section 85, Chapter 28, Political Code.

(1646, Compiled Laws.)

The warrant is no more a protection so as to make the acts of the treasurer the less wrongful, than is a warrant issued to a sheriff out of a court not having jurisdiction of the subject matter, a protection to such sheriff. The treasurer derives his authority to make the sale, not from the warrant, but from the statute alone.

Parker v. *Sexton*, 29th Ia. 42.
Hurley v. *Powell*, 31st Ia. 64.
Rhodes v. *Sexton*, 33rd Ia. 540.
R. R. Co. v. *Carroll Co.* Ia. 41st Ia. 153.
Black on Tax Titles, Section 46.
Sharp v. *Speir*, 4th Hill 76.

Even in the case of personal property, a warrant is no protection in cases where there was no jurisdiction.

State v. *Shacklett*, 37th Mo. 280.
Henry v. *Sargent*, 13th N. H. 339.
Waters v. *Davies*, 4th Vt. 601.
Kelley v. *Noyes*, 43rd N. H. 209.
Cunningham v. *Mitchell*, 67th Pa. State, 82.
Walden v. *Dudly*, 49th Mo. 420.

In the latter case the court say:

"The collector is an executive officer; in general it is his duty to collect all the taxes contained in the assessment list. He has no discretion in the matter and is liable for the non-performance of his duty. The exception is that when property is expressly exempt from taxation by law, then the assessor has no jurisdiction. The assessment is simply void. He has no right to collect it, accordingly we have uniformly held that the collector is not personally liable when the assessment has been irregular, provided there was no liability, and on the other hand THAT

HE IS LIABLE WHEN THE PROPERTY IS WHOLLY EXEMPT.

The learned counsel for the appellant contends that the provision making the treasurer and his sureties liable for the money wrongfully received shows an intent to restrict his liability to acts which are peculiarly his own, but the statute has created no new or additional liability, and the language referred to by the learned counsel only strengthens our position, that the statute is simply declaratory of the common law, making the treasurer liable for monies received by him, which he had no authority to receive and no right to retain. The liability of the treasurer in this case is no greater and no different, except as to the amount of interest to be recovered, than that of the collector in the cases of *Hayes* v. *Pacific Mail Steamship Company*, *supra*.

Counsel also contends that as the taxes levied were not merely county taxes, but territorial and school taxes as well, only that portion of the money which went into the county treasury for its use, can be recovered back in any event. But if this was money which the treasurer of the county, as its agent, had no authority to collect or receive for any purpose, and such as neither the territory nor the county could lay any lawful claim to, it certainly makes no difference for what purpose the treasurer claims to have collected it. It is certainly a most novel defence in an action to recover monies paid by mistake, and wrongfully collected, by one having no right or authority to receive it, that he claims to have received it for the use and benefit of another, who had

and could have no better right to it than himself. If the money was wrongfully collected and belongs to the plaintiff, and is such as only the plaintiff can lay any lawful claim to, it can certainly make no difference for what purpose it was collected, or among how many it has been distributed.

Counsel further contends that: "even if the recovery of the principal amounts claimed were justifiable, this interest allowance has no justification; interest at the rate of 30 per cent. should have been allowed, at most, only for the time prescribed for redemption for tax sales, namely, for two years from the dates of such sales." But counsel evidently overlooks the fact that the statute of Dakota Territory, section 70, chapter 28 of the political code, (section 1635, compiled laws) fixes the term of redemption "at any time within two years after the date of such sale, OR AT ANY TIME BEFORE THE EXECUTION OF A DEED OF CONVEYANCE THEREFOR BY THE COUNTY TREASURER."

All of these questions have been carefully considered by the courts of the territory, and none of them were urged before the state supreme court upon the last trial of this question in the case of *Tyler* v. *Cass County*.

The question of liability of the county under the statute, as well as that of the measure of the plaintiff's right to recover, have been most carefully considered in the case of *Wilson* v. *Butler County*, 42 N. W. (Nebraska) 891. Judge Maxwell, in his opinion, says:

"The attorney for Butler county concedes

that the county is liable for the money paid for the tax purchase of the land, but contends that the county is not liable for taxes thereafter voluntarily paid on such land. A party having a lien on real estate, and having reason to believe that he has such a lien, by paying taxes to protect the same, cannot be said to have made such payments voluntarily so as to preclude a recovery. The purpose is to protect his interest and if he fails to do this, the land would in all probability, be sold, and his security be clouded or lost. This rule is constantly applied in cases of foreclosure of mortgage, and the courts have even given the mortgagee who paid the taxes to protect the security, the right over prior incumbrances, whose liens the payment served to protect.

Davis v. *Bean*, 114 Mass. 360; *Barthell* v. *Syverson*, 54 Iowa 160.

The attorney for the county contends that as these taxes were not legally chargeable against the land therefore the plaintiff and her grantors paid the same at their peril, and as the land was not taxable, therefore there was no valid charge against the same, and there can be no recovery. We do not so understand the law; the objection is not to the vilidity of the taxes if levied on taxable real estate *but they were levied on property which was expressly excepted by the constitution from taxation.* The county caused the property to be assessed from year to year, and levied taxes thereon, and held it out to the world as being taxable, and extended it on its records as such, and that certain taxes were due thereon, which its treasurer from year to year received. The tax purchaser has the right to assume that the records of the county state the facts as they actually exist, and rely upon them, but is not compelled to look elsewhere for evidence of their veracity. With what consistency can the county say, in effect: 'I assessed the property and levied the taxes thereon, which you paid and the money is now in the county treasury, but no taxes were due on such land, and you should not have

paid the same. But having done so, you must suffer the loss.' * * * * *
Such an answer would not avail between individuals, and should not be tolerated. The case is entirely different from that of the tax payer who voluntarily pays a questionable tax without objection. In such case there can be no recovery because the party waives the objection by deliberately paying the money claimed. He may have an object in this. * * * * *
The law for the protection of tax payers however, is designed as an inducement to those who may purchase real estate upon which taxes are delinquent, but granting to them, at least the repayment of the purchase price, and interest, in case the title to the property and lien of the taxes thereon fail from any cause. And so well has the law operated that taxes as a rule in the state are promptly paid. The delinquent list being of but small proportions, while no person has been robbed of valuable property for a trifle; but no county will be permitted to retain money collected as in the case at bar, to which it has no lawful or equitable right."

The statute creating the liability according to the construction placed upon it by the supreme court of the territory, having been previously construed by the highest courts of the states of Iowa and Nebraska, from which it was adopted, and the supreme court of the Territory of Dakota having properly adopted the construction of those courts, this court will give great weight to such construction, if not receive it as absolutely binding upon it. *Jno. M. Sweeny et al* v. *W. F. Lomme*, 22 Wallace 208; *Calomet, et al* v. *Doull*, 133 U. S. 216.

FOURTH AND FIFTH ASSIGNMENT.

The motion for judgment, (printed record, page 33), motion for new trial, (printed record, page 37-42-43) in which such assignment and motion for a rehearing is included, are but corollaries of the other assignments, and stand or fall with them. They are fully considered in the argument of the other assignments of error, and in our view of the case, require no further elaboration,

We contend, therefore, that the decision of the district court of Stutsman county, (printed record, page 34), which was in all things affirmed by the supreme court of the territory, in a decision which necessarily involved the construction of the statute, as herein contended for, contained no error, but was an unavoidable conclusion, based upon the facts of this case and the law applicable thereto.

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